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Supreme Court of the United States

October Term, 1976

No. 77-41

CITY OF CLEVELAND, OHIO,
Petitioner,

vs.

THE CLEVELAND ELECTRIC ILLUMINATING COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the Court of Appeals for the Eighth Appellate Judicial District of the State of Ohio

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PETITION FOR WRIT OF CERTIORARI

To the Court of Appeals for the Eighth Appellate Judicial District of the State of Ohio

The petitioner prays that this Honorable Court issue a writ of certiorari to review the judgment of the Ohio Eighth District Court of Appeals entered on December 2, 1976, in the case of *The Cleveland Electric Illum. Co. v. Cleveland* (1976), 50 Ohio App. 2d 275.

OPINIONS BELOW

The Court of Common Pleas of Cuyahoga County, Ohio, in case No. 892,126 on June 4, 1975 without an opinion granted in full the claim of The Cleveland Electric Illuminating Company for $547,115.33 due on an alleged contract. The Court's judgment is attached hereto as Appendix A.

The City of Cleveland appealed the Common Pleas decision to the Ohio Eighth District Court of Appeals. The Court of Appeals affirmed the Common Pleas decision in an opinion, printed in Appendix B hereto, which is reported in 50 Ohio App. 2d 275.

Consolidated with case No. 892,126 was a second action also brought by The Cleveland Electric Illuminating Company (case No. 917,167). The Court of Common Pleas dismissed that action for want of jurisdiction. The Cleveland Electric Illuminating Company appealed that decision to the Ohio Eighth District Court of Appeals which consolidated the two cases and subsequently in the same opinion reversed the Common Pleas judgment.

The City of Cleveland appealed the decision of the Ohio Eighth District Court of Appeals in both cases to Ohio's highest court, the Supreme Court of the State of Ohio. The Court's notice of refusal to review the decision of the Ohio Eighth District Court is attached hereto as Appendix C.

JURISDICTION

Petitioner seeks a review by this Court of the judgment of the Ohio Eighth District Court of Appeals in both actions which has an entry date of December 2, 1976.

The jurisdiction of this Court is invoked under 28 U.S.C., Section 1257(3), to reverse the unlawful adjudication by state action of the amounts owed, if any, under technical interstate electric tariffs. The same tariff issues were concurrently before the Federal Power Commission upon remand from the United States Court of Appeals for the District of Columbia Circuit.

The jurisdiction of this Court is also invoked under 28 U.S.C., Section 1257(3) to reverse the unlawful assumption of jurisdiction in the second case.

QUESTIONS PRESENTED

The fundamental questions of national importance raised by this petition relative to the first case are:

1. When the Federal Power Commission and the Federal courts have exercised their jurisdiction under the Federal Power Act to determine the rates for the sale of electric energy at wholesale in interstate commerce is it lawful for a state court subsequently to adjudicate the same rate issues?

2. Should a state court in a collection action based upon electric wholesale tariffs employing highly technical terms peculiar to the electric utility industry defer the interpretation and proper factual application of those terms to the Federal Power Commission?

3. Does a party to a Federal tariff dispute lose his right to a Federal adjudication thereof merely because the other party runs more quickly to a state court?

4. Does a party to a Federal tariff dispute lose his right to a Federal adjudication thereof when the other party secures a faster determination by a state court?

The sole question posed by the second action is:

Do the Federal courts have exclusive jurisdiction over all actions based upon tariffs set by the Federal Power Commission?

STATUTES INVOLVED

Sections 201, 205(a) and 317 of the Federal Power Act are involved in this case. Sections 201 and 205(a) are concerned with the first action, while Section 317 is relevant to the second one.

Sections 201 and 205(a) give the Federal Power Commission jurisdiction over sales between electric utilities. Section 201 (16 U.S.C. 824), which defines the sales subject to the Federal Power Act, in pertinent part is as follows:

> "(a) It is declared that . . . Federal regulation of . . . the sale of . . . energy at wholesale in interstate commerce is necessary in the public interest . . . ."

> "(b) The provisions of this subchapter shall apply to . . . the sale of electric energy at wholesale in interstate commerce . . . ."

Section 205(a) of the Federal Power Act (16 U.S.C. 824(d)) confers upon the Federal Power Commission the duty to regulate the above sales:

> "All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful."

Section 317 of the Federal Power Act (16 U.S.C. 825(p)) which would appear to give the Federal courts exclusive jurisdiction over all collection actions based upon

tariffs set by the Federal Power Commission in pertinent part provides that:

> "The District courts of the United States, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have *exclusive jurisdiction* of violations of this chapter . . . and of all suits in equity and *actions at law brought to enforce any liability* or duty *created by*, or to enjoin any violation of, *this chapter or any rule, regulation or order thereunder . . .*" (Emphasis added).

STATEMENT OF THE CASE

Facts—First Action

The Cleveland Electric Illuminating Company (hereinafter referred to as either "CEI" or the "Company") on February 18, 1971, filed an action before Cuyahoga County Common Pleas Court (C.P. 892,126) to collect from the Division of Light and Power of the City of Cleveland (hereafter designated "MELP") for the sale of electric energy. This action is hereinafter described as the "first action".

Shortly thereafter on May 13, 1971, MELP filed a complaint before the Federal Power Commission (FPC) to determine among other things whether the amount due CEI should be computed in accordance with either the terms contained in City of Cleveland Ordinance No. 161-70, which was the result of negotiations between the City and CEI, or the rates resulting from a series of four letters between City and Company officials. On July 12, 1972, an examiner of the FPC resolved the rate controversy in favor of CEI by finding that since the Company had only

filed the four letters with the FPC and had not filed the ordinance rates, the only applicable rates could be the "letter" rates. The FPC in its final decision of January 11, 1973 (Federal Power Commission Opinion No. 644), adopted the examiner's findings.

MELP appealed the FPC decision to the United States Court of Appeals for the District of Columbia Circuit. The Court of Appeals remanded the case back to the FPC to determine whether the ordinance or letter rates should be applied. The Court's decision of January 9, 1976, is reported at 525 F.2d 845 and is attached hereto as Appendix D.

After the City's appeal to the United States Court of Appeals for the District of Columbia Circuit, but before that Court's remand of the FPC decision, a trial was held on October 21, 1974, before Cuyahoga County Common Pleas Court. Common Pleas Court granted judgment in favor of CEI.

Both Common Pleas Court and the Ohio Eighth District Court of Appeals found that there was no difference between the ordinance and letter rates. That determination goes to the very heart of the City's Petition for a Writ of Certiorari in this case. The United States Court of Appeals in the case of *City of Cleveland, Ohio v. Federal Power Commission*, 525 F.2d 845 at pages 855-857 found that there was an important difference in the ordinance and letter rates. The opinion of the Ohio Eighth District Court of Appeals correctly displays both the ordinance and letter rates (*Illum. Co. v. Cleveland*, 50 Ohio App. 2d 275, 292, printed in Appendix B hereto, *infra*, p. A23).

Facts—Second Action

Also while the City's appeal was pending in the Columbia Circuit Court, CEI filed a second action in the Common Pleas Court of Cuyahoga County (C.P. 917,167) to collect for charges rendered under rates that had been set by Federal Power Commission Opinion No. 644 as of May 30, 1972. The first and second actions were consolidated for trial. Common Pleas Court dismissed the second action for want of jurisdiction. The Ohio Eighth District Court in a split decision found that Common Pleas Court could have jurisdiction and remanded the second action back to Common Pleas Court.

How the Federal Questions Were Raised

All of the Federal questions raised by the ordinance tariff issues involved in the first action are founded upon the timely introduction into evidence in Common Pleas Court by MELP of a copy of the rate ordinance and the expert testimony of Dan Sack, a certified professional engineer, who explained the difference between the ordinance and letter tariffs. Both before and during the trial in Common Pleas Court, MELP asked Common Pleas Court to refer the tariff issues to the FPC. The discussion of the tariff issues by the Eighth District Court shows that those issues were properly raised to that Court. At no time has CEI questioned the timeliness of MELP's raising of these issues.

REASONS FOR GRANTING THE WRIT

I. The Reversal of the Judgment of the Ohio Eighth District Court of Appeals Is Necessary to Preserve the Proper Functioning of the Federal and State Adjudicative Systems

Utility rate cases are seldom, if ever, either simple or inexpensive. Hearings by both state and Federal bodies of the same tariff issues add intolerable confusion and cost to the resolution of such matters. The most probable result as in this case is different adjudications of the same subject matter.

The initial FPC hearings had been concluded and an appeal lodged before the United States Court of Appeals for the District of Columbia Circuit, when the trial of the first action now before this Court began in Cuyahoga County Common Pleas Court. By the time of that trial the Federal government had already incurred substantial cost through the employment of many of its employees on these rate matters. Certainly all of that Federal effort and expense should not go for naught because the State of Ohio belatedly overtook the Federal decision making process.

It was to obviate this waste and duplication of adjudicative processes that the doctrine of primary jurisdiction has evolved. Particularly in point is this Court's holding in *United States v. Western Pac. R. Co.*, 352 U.S. 59 (1956), where it was held at page 66 that it is necessary to suspend the judicial process pending a review by the appropriate administrative agency of tariff issues.

> ". . . where words in a tariff are used in a peculiar or technical sense, and where extrinsic evidence is necessary to determine their meaning or proper application, so that 'the enquiry is essentially one of fact and of discretion in technical matters'. . .".

The principal technical issue presented in this case is whether MELP should be charged under the ordinance tariff for a demand charge of thirty cents (30¢) a month per KVA based upon actual monthly usage or for "demand ratcheting" under the letter tariffs. The Ohio courts adjudicated that issue by finding that the ordinance and letter tariffs were in effect the same (See *Cleveland Electric Illum. Co. v. Cleveland*, 50 Ohio App. 2d 275 at pages 291-5). By way of contrast the United States Court of Appeals for the District of Columbia Circuit concluded that the letter rates were different from the ordinance rates and that the potential of the letter rates ". . . for major, automatic increases in the price of electricity to the City and its customers, the importance of the issue over it can hardly be downplayed. . . ." (*City of Cleveland, Ohio v. Federal Power Commission*, 525 F.2d 845, 851, *infra*, p. A41).

II. It Would Be Desirable to Define the Limits of Pan American Petroleum Corporation v. Superior Court of Delaware for New Castle County, et al., 366 U.S. 656, 6 L.Ed.2d 584 (1961)

In the *Pan American* case the United States Supreme Court held that the plaintiff could sue in state court for amounts due on natural gas sale contracts even though the FPC had regulatory jurisdiction over the tariffs for such sales. The Ohio Eighth District Court of Appeals relied heavily upon the *Pan American* decision to justify its preemption of Federal jurisdiction over the rate matters involved in both actions brought by CEI against MELP.

The Eighth District Court in its opinion went to the extreme of holding that Common Pleas Court erred by dismissing CEI's second action which was explicitly founded on electric tariffs set by the FPC. The Court did this in a split decision despite the clear provisions of Section 317 of the Federal Power Act (16 U.S.C. 825(p)) which grant exclusive jurisdiction to the Federal courts to hear all suits based upon such tariffs.

Petitioner believes that the *Pan American* case should be treated as *sui generis* instead of being given wide application as did the Ohio courts. In the first action there has been a heavy involvement of both the FPC and the Federal courts; by contrast the first resort to Federal adjudicatory authority in *Pan American* was on the appeal to the United States Supreme Court from a state court. Also, the first matter requires the determination of highly technical matters peculiar to the electric utility industry and the factual findings related to the application of the technical provisions of the tariffs to the facts of this case, all of which necessitate the special expertise of the FPC; the *Pan American* case was merely concerned with a readily ascertainable difference in unit price per thousand cubic feet of gas sold.

III. It Is Important to Determine Whether Federal Courts Have Exclusive Jurisdiction Over All Actions Based Upon Tariffs Set by the FPC

The tariffs set by the FPC for sales between electric utilities involve hundreds of electric utilities and amount to many billions of dollars per year. Through various fuel adjustment clauses most of those charges are directly passed on to many millions of ultimate customers. It is vital that the United States Supreme Court decide whether the Federal Power Act prohibits state courts from

passing upon any question related to this enormous commerce between electric utilities.

CEI in its pleadings has clearly stated that its second action was an effort to collect on amounts claimed due for sales rendered under rates set by the FPC. It is the City's position that the Federal Power Act conferred exclusive jurisdiction upon the Federal courts to hear such suits. Section 317 of the Federal Power Act (16 U.S.C. 825(p)) provides in pertinent part:

> "The District courts of the United States, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have *exclusive jurisdiction* of violations of this chapter . . . and of all suits in equity and *actions at law brought to enforce any liability* or duty *created by,* or to enjoin any violation of, *this chapter or any rule, regulation or order thereunder. . .*" (Emphasis added).

IV. Both Congress and This Court Have Recognized the Need for Close Federal Review of Dealings Between Large Privately Owned and Small Publicly Owned Electric Utilities

When Congress wrote the Atomic Energy Act of 1954, it specifically provided for administrative review of the impact upon competition of the ownership and use of nuclear energy plants. The electric utility industry is the only one to have ever been the subject of such special Congressional concern. The Federal courts have often in recent years given relief to small publicly owned electric utilities from the predatory, anti-competitive practices of the larger privately owned electric utilities; *Otter Tail Power Co. v. United States,* 410 U.S. 366 (1973), is illustrative of this.

The Atomic Safety and Licensing Board of the Nuclear Regulatory Commission has cited CEI for its anti-trust violations against MELP. MELP has a $327,000,000 anti-trust suit filed against CEI in the Northern District Court of Ohio, Eastern Division (Case No. C75-560). MELP may not survive long enough to see that case through.

Since the Federal adjudicatory system is more sophisticated in anti-trust matters, MELP and other similarly situated utilities need to remain as far as possible within the Federal system and outside of the state systems when involved in litigation with privately owned electric utilities. Congress as noted before has in Section 317 of the Federal Power Act conferred upon the Federal courts exclusive jurisdiction over all actions based upon tariffs set by the FPC. It is submitted that in view of the sweeping nature of the Federal Power Act and the special concern shown by Congress for the maintenance of competition within the electric utility industry that either the FPC should likewise be deemed to have exclusive jurisdiction over *all* tariffs properly the subject of its jurisdiction or that the doctrine of primary jurisdiction be liberally applied relative to all tariffs filed before the FPC so as to require the suspension in state courts of all matters related to FPC tariff construction and findings of fact related thereto, pending the appropriate review by the FPC of such tariff matters.

V. The Ohio Courts Committed Manifest Error in Failing to Refer the Tariff Issues to the FPC

The FPC was given primary, if not exclusive, jurisdiction in the Federal Power Act over technical factual tariff issues covering the sale of electric energy between electric utilities. The pertinent provisions are Sections 201 and 205(a) which are listed herein at page 4.

The Ohio courts acknowledged that if such issues were involved in this case that they should be resolved by the FPC (See *Illum. Co. v. Cleveland,* 50 Ohio App. 2d 275, 288-90, Appendix B, *infra,* pp. A19-20). The Ohio courts erred by blatantly refusing to recognize their existence. That they did exist is more than abundantly supported by the following:

1. The testimony of five witnesses, two of whom were professional engineers.

2. The complex terminology of the tariffs themselves.

3. The extended and convoluted rationale employed by the Ohio courts to arrive at the conclusion that the ordinance and letter tariffs were the same (*Illum. Co. v. Cleveland,* 50 Ohio App. 2d 275, 291-5, Appendix B, *infra,* pp. A22-26).

4. The holding by the United States Court of Appeals for the District of Columbia Circuit that there was an important difference between the ordinance and letter tariffs.

CONCLUSION

WHEREFORE, the petitioner prays for the reasons given herein that a writ of certiorari directed to the Ohio Eighth District Court of Appeals may issue under the seal of this Honorable Court in this cause and upon such review the judgment of the Ohio Eighth District Court of Appeals entered on December 2, 1976, be vacated, reversed, and set aside and that this case be remanded to

the Ohio Eighth District Court of Appeals with instructions to proceed in accordance with the rulings of this Court.

Respectfully submitted,

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APPENDIX A

Judgment Entry of the Court of Common Pleas

(Filed June 4, 1975)

Case No. 892126

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

THE CLEVELAND ELECTRIC ILLUMINATING COMPANY,
Plaintiff,

vs.

THE CITY OF CLEVELAND,
Defendant.

The Court finds on the First Count:

That the contract between The Cleveland Electric Illuminating Company and The City of Cleveland, of January 20, 1970, is a valid and enforceable contract;

That the agreements of January 20, 1970, March 17, 1970, June 9, 1970 and July 20, 1970, are valid and enforceable contracts;

That Cleveland City Charter Sections 83, 106, 107, 108 and 109 are not applicable to this controversy.

And on the Second Count, plaintiff is awarded judgment for Five Hundred Forty-Seven Thousand One Hundred Fifteen and 33/100 Dollars ($547,115.33), plus interest at six per cent (6%), from date of last payment, and costs.

On the counterclaim of the defendant, the Court finds for the plaintiff.

Prevailing party to draw up Journal Entry.

/s/ AUGUST PRYATEL
Judge

APPENDIX B

Opinion of the Court of Appeals of Cuyahoga County, Ohio

(Decided December 2, 1976)

Case No. 34959

CLEVELAND ELECTRIC ILLUMINATING CO.,
Appellant,

vs.

CITY OF CLEVELAND,
Appellee.

Case No. 35002

CLEVELAND ELECTRIC ILLUMINATING CO.,
Appellee,

vs.

CITY OF CLEVELAND,
Appellant.

Courts—Jurisdiction—Action may be brought in state rather than federal court, when—Traditional common laws claims alleged—Municipal corporations—Electric power purchased by director of utilities—requirement in city charter that finance director certify funds are available when contracts made—Provision not applicable where payments made from operating funds.

1. Questions of exclusive federal jurisdiction and the ouster of jurisdiction of state courts are determined by the claims made by the suitor in his complaint. The plaintiff bringing the suit is free to decide what

law he will rely upon (*Pan American Petroleum v. Superior Court of Delaware* (1961), 366 U. S. 656, 6 L. Ed. 2d 584 followed).

2. Where a plaintiff asserts a traditional common-law claim in an action brought in a state court, this claim does not lose that character solely because there exists a scheme of federal regulations of the subject matter of the suit.

3. Section 317 of the Federal Power Act, Section 825p, Title 16, U. S. Code, which provides that "[t]he District Courts of the United States * * * shall have exclusive jurisdiction of violations of [the Federal Power Act] or the rules, regulations, and orders thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by, or to enjoin any violation of, this chapter or any rule, regulation, or order thereunder," does not bar a plaintiff from pursuing at his option remedies based solely on state law in a state court for breach of a contract for the wholesale purchase of electric power.

4. The doctrine of primary administrative jurisdiction permits a court to avail itself of the expertise of an administrative agency having special competence in a matter before the court by suspending proceedings originally cognizable in the court pending resolution of such matter in the administrative agency.

5. The doctrine of primary administrative jurisdiction does not apply to a question which, while properly determinable by an administrative agency, does not involve matters within the special expertise of the agency, such as a matter of law.

6. The construction of sections of the Charter of the City of Cleveland and municipal ordinances enacted pursuant to authority provided therein are not within the special expertise of the Federal Power Commission.

7. The courts of Ohio are the ultimate arbiters of Ohio law and the duties and obligation thereunder.

8. A provision of the municipal charter, requiring a certificate from the director of finance of the City of Cleveland certifying that sufficient funds are available before a contract on behalf of such municipality is entered into, has no application where the director of public utilities enters into a contract for the purchase of electric power, the funds for such purchase being derived from operating revenues of the public utility and not from taxation (Paragraph 6 of the Syllabus of *Burt v. City of Cleveland* (1945), 76 Ohio App. 451, approved and followed).

9. An ordinance which is ambiguous must be interpreted in light of the circumstances under which it was enacted.

JACKSON, C. J. The City of Cleveland (hereinafter designated "City," appellee in Case No. 34959 and appellant in Case No. 35002) operates the Municipal Electric Light Plant (hereinafter designated "MELP") serving approximately twenty per cent (20%) of the retail load within the City of Cleveland. The remainder of that load is served by the Cleveland Electric Illuminating Company (hereinafter designated "CEI," appellant in Case No. 349-59, and appellee in Case No. 35002), a public utility under the Federal Power Act.[1]

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1. See Section 824e, Title 16, U. S. Code.

The facilities of MELP have been described as "* * * an isolated, poorly designed and relatively unreliable system * * * consisting of generating units in a 'sad state of repair' and a history of inefficient operations."[2] Since 1942 there have been intermittent proposals for a permanent interconnection between CEI and MELP. The parties, however, failed to come to any agreement until after MELP experienced a severe power outage during Christmas, 1969.

Officials of CEI and the City met after the Christmas, 1969 outage and developed a basic understanding for the interconnection of the two systems. As a result of this understanding on January 19, 1970, the City Council enacted Ordinance 161-70[3] authorizing the director of public

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2. Presiding Examiner's Initial Decision in Consolidated Proceedings before the Federal Power Commission, Docket Nos. E-7631 and E-7633, p. 1; *modified and as modified aff'd*, Federal Power Comm. Opinion No. 644 (January 11, 1973); *rev'd on other grounds, City of Cleveland v. Federal Power Comm.* (D. C. Cir. 1976), 525 F. 2d 845.

3. City Ordinance No. 161-70 states:

"Whereas, The recent outages at the Muny Light Plant resulted in hardship to many Cleveland users and created a safety hazard due to the nonperformance of street lighting; and

"Whereas, it is important that a tie-in is completed, temporary measures will be taken to assure assistance in case of another emergency; and

"Whereas, This ordinance constitutes an emergency measure providing for the usual daily operation of a municipal department, now, therefore

"Be It Ordained By The Counsel Of The City Of Cleveland:

"*Section 1.* That Ordinance No. 115-70 passed January 12, 1970 be and the same is hereby repealed.

"*Section 2.* That the Director of Public Utilities be and he hereby is authorized to enter into an agreement with the Illuminating Company whereby a temporary tie-in will be effected between the Municipal Light Plant and the CEI at the Collinwood Substation and the Artic [*sic*] Substation, the Denison Substation, the Western Substation and the Clinton Substation.

(Footnote continued on following page)

utilities to contract with CEI for the purchase of power.[4] The ordinance also specified the rates to be paid by the City for the purchase of such power.

Pursuant to the power granted him in Ordinance No. 161-70 the Director of Public Utilities, Ben F. Stefanski, II, entered into a contract with CEI for the wholesale purchase of electric power. The contract was contained in a letter from Lee C. Howley, vice president and general counsel of CEI, to Mr. Stefanski. The rates agreed to in this "letter agreement" were filed with and approved by the Federal Power Commission (hereinafter designated "FPC"[5] pursuant to the Federal Power Act.[6] The letter agreement and the FPC rate schedule were amended by the parties through subsequent letters three times.[7] Dur-

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Footnote Continued—

"Said agreement will be prepared by the Director of Law and shall provide that the City will reimburse the Illuminating Company for the cost of the interconnection and shall indicate therein the amount of load to be transferred to CEI at each Substation.

"Said agreement shall provide further that the CEI shall sell said power to the City at a rate not to exceed 30c a month per KVA demand, $0.0085 per KWH for 10 million KWH and $0.005 per KWH above 10 million.

"*Section 3.* The cost herein authorized shall be paid from Fund No. 201 (B. O. 1297-68), Request No. 16-70.

"*Section 4.* That this ordinance is hereby declared to be an emergency measure and, provided it receives the affirmative vote of two-thirds of all the members elected to Council, it shall take effect and be in force immediately upon its passage and approval by the Mayor; otherwise it shall take effect and be in force from and after the earliest period allowed by law.

"Motion to suspend rules. Charter and statutory provisions and place on final passage.

"The rules were suspended. Yeas, 33, Nays 0.
Read second time. Read third time in full. Passed.
Yeas 33, Nays 0."

4. Ordinance 161-70 also repealed Ordinance 115-70 enacted seven days previously which also authorized the director of public utilities to contract with CEI for the purchase of electric power.

5. FPC Rate Schedule No. 7.

6. Sections 834d and e, Title 16, U. S. Code.

7. March 17, 1970; June 9, 1970; and July 22, 1970.

ing all these proceedings no objections were interposed by the City to the letter agreement or its filing under federal law.[8]

The interconnection was initiated in February, 1970, and the record reveals that CEI performed all of the responsibilities required of it under the letter agreement. The City, however, increasingly fell behind in its payments to CEI, and on February 18, 1971, CEI filed suit against the City in the Common Pleas Court of Cuyahoga County, Ohio[9] (hereinafter the first action).

While this suit was pending in Common Pleas Court, the City, fearing that CEI would terminate the interconnection for non-payment, filed a complaint with the FPC.[10] The complaint sought an order directing CEI not to disconnect from MELP, a determination of the rates due CEI for the power supplied since the initiation of the interconnection,[11] and an order directing CEI to maintain a permanent interconnection with MELP.

On March 10, 1972, the FPC ordered that as of May 17, 1972, CEI must maintain a temporary emergency interconnection with MELP, pending final determination of the City's complaint. Prior to this date CEI had voluntarily maintained the interconnection.[12] Interim rates for

8. Section 824e, Title 16, U. S. Code, allows the filing of a complaint to challenge filed rates.

9. C. P. No. 892,126; C. A. No. 35002

10. E-7631

11. This was the first time the City objected to the rates contained in the letter agreement and alleged that those rates differed from the rates specified in the City Ordinance. The City has not explained why it waited over a year and until it was substantially in arrears to CEI before raising this objection.

12. The letter agreement provided that the "* * * transfer of load service will be provided until two gas turbines contracted for by the City are in commencial operation, or December 31, 1971, whichever is earlier."

this temporary interconnection were set by another FPC order.

The FPC issued its final order resolving the City's complaint on January 11, 1973—Order 644. The FPC directed that a permanent interconnection be maintained between CEI and MELP and specified the rates which CEI could charge for this power. The order made these rates retroactive to May 17, 1972, the date the FPC first ordered CEI to maintain the interconnection. Included within the rates was a sanction for late payment by the City. The order also determined the rates prior to May 17, 1972.

In deciding the rates allowable prior to this date, the FPC relied upon the filed rate doctrine[13] and determined that the rates were to be those contained in the letter agreement filed with the FPC. The commission ignored City Ordinance No. 161-70, stating that the effect of this ordinance was only a "local matter between the City and its officials."[14]

The City filed a timely notice of appeal to the United States Court of Appeals for the District of Columbia Circuit,[15] pursuant to federal law. The City alleged that the commission erred first in dismissing the City Ordinance as only a matter of local concern in determining the rates prior to May 17, 1972; second, in that the permanent rates lacked substantial supporting evidence; third, in including

13. The filed rate doctrine basicly states that a public utility may charge only the rate on file with the Commission unless changed in a manner sanctioned by the regulatory statute, *Pennsylvania Railroad Co. v. International Coal Co.* (1912), 230 U. S. 184, 57 L. Ed. 1446.

14. Presiding Examiner's Initial Decision in Consolidated Proceedings before the Federal Power Commission, Docket Nos. E-7361 and E-7633, p. 10; *modified, and as modified aff'd*, Federal Power Commission Opinion No. 644 (January 11, 1973).

15. Case No. 73-1282

an amount of Ohio excise tax in the makeup of the permanent rates; and fourth, in sanctioning a charge for late payment.

While the appeal was pending in the United States Court of Appeals, CEI filed a second action in the Common Pleas Court of Cuyahoga County, Ohio[16] (hereinafter designated the second action). The second action prayed the court for monies due since May 17, 1972, for the sale of electric power to the City by CEI.

The first and second actions were consolidated for trial and heard without a jury. The court entered its final judgments in both cases by entries dated June 4, 1975. In the first action the court found that the contract between the City and CEI contained in the letter agreement was valid and enforceable, and the City Charter provisions[17] alleged by the City as a defense were inapplicable to the controversy. The court awarded CEI damages of $547,115.33, and interest, for breach of the agreement.

In the second action the court dismissed the complaint for want of jurisdiction.

The City appealed from the judgment against it in the first action. CEI appealed from the dismissal of the second action. The cases were consolidated in this court.

There appears to be no dispute[18] that while these appeals were pending the FPC upon motion of CEI[19]

16. C. P. No. 917,167; C. A. No. 34959

17. *See* Section IV, *infra.*

18. Occurrences subsequent to the hearing in the trial court are not contained in the record. The City, however, has attached copies of relevant documents to its brief and CEI has stipulated in open court that the documents accurately reflect the proceedings.

19. In response to a previous motion by CEI praying that the FPC enforce its orders the City responded that "* * * there is no refusal to pay the bills [of the City] but a present inability

(Footnote continued on following page)

issued an order dated April 8, 1974, which directed the City to comply with all previous orders of the FPC.[20] The FPC subsequently filed suit against the City in the United States District Court for the District of Columbia[21] pursuant to Section 825m(a), Title 16, U. S. Code,[22] praying that

Footnote Continued—

to do so * * *." The City went on to argue to the Commission that the motion should be overruled and "* * * CEI remitted by the Commission to CEI's proper remedy in the state court." The City has been unable to explain to the satisfaction of the court why at the same time it was urging the Common Pleas Court to dismiss for want of jurisdiction, it was urging the FPC that the Commission should take no action against the City, as CEI's proper remedy was in state court.

20. More specifically, the order stated:

"(B) The City of Cleveland will henceforth pay CEI all sums past due to which no controversy attaches as well as accrued interest charges. With respect to that portion of any bill presently due and owing and to which controversy does attach, the City is ordered to place that sum in a special escrow account. With respect to bills for future services the City is ordered to pay CEI those sums to which no controversy attaches, as well as any interest charges that accrue. With respect to that portion of any future bill to which a controversy does attach, the City is ordered to place that sum in the same escrow account. The amounts deposited in escrow will include all interest charges accrued up to and including the date on which the disputed amounts are so placed. The sums placed in escrow will remain there pending judicial review in these proceedings, and the final escrow account balance, as well as all interest accrued while those sums were in escrow, will be distributed in accordance with the findings and order of the reviewing court. The Commission retains authority to approve the City's selection for the placement of the special escrow account." It was not appealed.

21. Case No. 75-2081

22. Section 825m(a), Title 16, U. S. Code, states:

"Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this chapter, or of any rule, regulation, or order thereunder, it may in its discretion bring an action in the proper District Court of the United States, the United States District Court for the District of Columbia, or the United States courts of any Territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices and to enforce compliance with this chapter or any rule, regulation, or order thereunder, and upon a proper

(Footnote continued on following page)

the City be enjoined from further violating the April 8, 1974 order. CEI was allowed to intervene as a new party plaintiff.[23]

While this suit was pending in the District Court, the United States Court of Appeals for the District of Columbia Circuit ruled upon the City's appeal from FPC Order 644. In *City of Cleveland v. F. P. C.* (D. C. Cir., 1976), 525 F. 2d 845, the court affirmed the decision of the Commission in all aspects of its order save for its ruling on rates prior to May 17, 1972.

The court found it was error for the FPC to adopt the rate structure filed by CEI without considering the City ordinance. That is, it was error for the FPC to dismiss the ordinance as purely a local matter. The court expressed no opinion as to whether the ordinance had any applicability to the dispute.

In the first action (Case No. 35002) before this court the City of Cleveland assigns three errors:

"I. The Common Pleas Court Had No Jurisdiction to Consider the matters before it.

"II. Assuming *arguendo* that the Court had jurisdiction, the Charter of the City of Cleveland is valid and applicable to City contracts and to this controversy.

"III. Assuming *arguendo* that the Common Pleas Court had jurisdiction, Ordinance 161-70, setting forth the

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Footnote Continued—

showing a permanent or temporary injunction or decree or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning such acts or practices to the Attorney General, who, in his discretion, may institute the necessary criminal proceedings under this chapter."

23. CEI prayed for a temporary and permanent injunction to prevent the City from violating the FPC order of April 8, 1974.

rates to be charges, [*sic*] is a valid ordinance and applicable to this controversy."

In the second action (Case No. 34959) CEI assigns one error:

"The Court should not have dismissed this action for lack of subject matter jurisdiction since this is essentially a collection action by CEI for electrical power sold and delivered to the City of Cleveland and, as such, this action is obviously adjudicable in state court and it is patently immaterial that the rates CEI charged the City were established and prescribed by the Federal Power Commission."

I.

The first assignment of error by the City in the first action and the assignment of error by CEI in the second action both raise the same issue: whether state courts have jurisdiction to render judgment against a delinquent debtor where the debts arise from the wholesale purchase of electricity.

The City contends that no such jurisdiction exists; it argues that in each case CEI is attempting to use the state courts to enforce orders of the FPC. With respect to the first suit, upon the filing of the letter agreement with the FPC the rates filed were tantamount to a specific order of the FPC. In the second action CEI is requesting the court to make a determination of its rights based upon FPC Order No. 644. In both cases CEI is subject to Section 317 of the Federal Power Act, Section 825p, Title 16, U. S. Code. Under this section, "[t]he District Courts of the United States * * * shall have exclusive jurisdiction of violations of [the Federal Power Act] or the rules, regulations, and orders thereunder, and of all of suits in equity and actions at law brought to enforce any liability or

duty created by, or to enjoin any violation of, this chapter or any rule, regulation, or order thereunder." If this statute is applicable, the state courts would be deprived of jurisdiction in this matter.

The United States Supreme Court was confronted with the same issue in *Pan American Petroleum Corporation v. Superior Court of Delaware* (1961), 366 U. S. 656, 6 L. Ed. 2d 584. In that case a natural gas pipeline company purchased gas from two natural gas producers for transportation in interstate commerce. The company was required to pay a higher price than stipulated in the contract by order of the Kansas Corporation Commssion. The excessive charges were paid under protest, while challenging the validity of the order which was subsequently held to be invalid. The company brought suit in the Superior Court of Delaware against the natural gas producers to recover the overpayments. The gravemen of the suits was implied contract to refund overpayments, if they were held invalid, and restitution based upon unjust enrichment.

The defendants moved for summary judgment based upon lack of jurisdiction. Their arguments were the same as those presented by the City in the case at bar, to-wit: under the Natural Gas Act the price to be paid for natural gas sold wholesale in interstate commerce must be in accordance with rates filed with the Federal Power Commission. Since the suits filed by the plaintiff involve rates so filed, they must either be to enforce a filed rate or to challenge a filed rate. If the suits are in the former category, they are subject to Section 22 of the Natural Gas Act, which provides that "[T]he District Courts of the United States * * * shall have exclusive jurisdiction of violations of [the Natural Gas Act] or the rules, regulations, and orders thereunder, and of all suits in equity and

actions at law brought to enforce any liability or duty created by or to enjoin any violation of this chapter, or any rule, regulation or order thereunder." Section 717u, Title 15, U. S. Code. If the suits are in the latter category, they lie within the purview of Section 19 of the Natural Gas Act which provides for review of commission orders in the United States Court of Appeals, Section 117r, Title 15, U. S. Code. In either case, the state courts are deprived of jurisdiction.

The trial court denied the defendant's motion for summary judgment, and the defendants brought a writ of prohibition in the Supreme Court of Delaware. That court sustained the jurisdiction of the trial court and denied the writ.

On certiorari, Justice Frankfurter speaking for a unanimous United States Supreme Court, affirmed:

"* * * questions of exclusive federal jurisdiction and ouster of jurisdiction of state courts are, under existing jurisdictional legislation, not determined by ultimate substantive issues of federal law. *The answers depend on the particular claims a suitor makes in a state court—on how he casts his action.* Since 'the party who brings a suit is master to decide what law he will rely upon,' *The Fair v. Kohler Die & Specialty Co.*, 228 US 22, 25, 57 L. Ed. 716, 717, 33 S. Ct. 410, the complaints in the Delaware Superior Court determine the nature of the suits before it." (Emphasis added.) 366 U. S. at 662, 6 L. Ed. 2d 589.

The court held that the rights asserted by the plaintiff were traditional common law claims, and that they did not lose that character because it is common knowledge that there exists a scheme of federal regulations of interstate transmission of natural gas.

The Supreme Court further held that Section 22 of the Natural Gas Act does not afford assistance for the petitioner:

"* * * 'Exclusive jurisdiction' is given the federal courts but it is 'exclusive' only for suits that may be brought in the federal courts. Exclusiveness is a consequence of having jurisdiction, not the generator of jurisdiction because of which state courts are excluded." 366 U. S. at 664, 6 L. Ed. 2d at 590.

Finally, the court dismissed the contentions of defendants that the state court suit would jeopardize the uniform system of regulations established by Congress. "* * * [T]he route to review [by the United States Supreme Court] is open to parties aggrieved by adverse state court decisions of federal questions"; thereby uniformity is maintained. The attainment of uniformity *does not* require that in every case where the construction of a federal law is in dispute that resort must be made to the federal system.

Other federal courts have followed the *Pan American* decision in interpreting other federal statutes giving the United States District Courts exclusive jurisdiction over federal regulatory statutes, rules, regulations and orders. In *McMahon Chevrolet, Inc. v. Davis* (S. D. Texas, 1975), 392 F. Supp. 322, the court held that there was no authority for ruling that Congress intended to prevent state courts from deciding cases which might have been brought under the Securities Exchange Act of 1934 if the plaintiff had so desired. The court went on to say that the exclusive jurisdiction of the federal courts under Section 78aa,

Title 15, U. S. Code,[24] does not bar a plaintiff from pursuing at his option remedies based solely on state law.

Similarly, the exclusive jurisdiction contained in Section 308 of the Packers and Stockyard Act, Section 209, Title 7, U. S. Code, has been held not to bar state remedies. In *Denver Union Stock Yard Co. v. Livak Meat Co.* (D. Colo. 1968), 205 F. Supp. 809, the court ruled that the defendant's claim that Sections 201, 302, 305, 307 and 308 of the Act, Sections 191, 202, 206, 208 and 209, Title 7, U. S. Code, which provide for extensive regulations of the packing and stockyard industry, does not convert an action founded on state law into one cognizable in a federal forum.

In addition to the Natural Gas Act, the Security Exchange Act and the Packers and Stockyard Act federal courts have recognized the co-existence of remedies based solely on state law even though there exists an extensive system of federal regulations in the Federal Food and Drug Act; *Clairol, Inc. v. Suburban Cosmetic and Beauty Supply, Inc.* (N. D. Ill., E. D. 1968), 278 F. Supp. 859;

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24. Section 78aa, Title 15, U. S. Code, states:

"The district courts of the United States, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this chapter or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder. Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by this chapter or rules and regulations thereunder, or to enjoin any violation of such chapter or rules and regulations, may be brought in any such district or in the district wherein the defendant is found or is an inhabitant or wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 225 and 347 of Title 28. No costs shall be assessed for or against the Commission in any proceeding under this chapter brought by or against it in the Supreme Court or such other courts."

National Labor Relations Act, *Association of Machinists v. United Aircraft Supply* (2d Cir. 1964), 333 F. 2d 367; and federal bankruptcy laws, *Farmco Stores, Inc. v. Newmark* (E. D. Cal. 1970), 315 F. Supp. 396.[25]

Consequently, we conclude that Section 317 of the Federal Power Act must be construed as are Section 22 of the Natural Gas Act and Section 27 of the Securities Exchange Act of 1934. These federal provisions do not bar a plaintiff from pursuing at his option remedies based solely on state law in state forums.

The first action in the case at bar is a suit to recover on a simple contract, the letter agreement. Under the Ohio Constitution, Section 4, Article IV, and R. C. 2505.01, the common pleas court has jurisdiction to adjudicate the rights and obligations of the parties under Ohio law without resort to the Federal Power Act or the rules, regulations or orders thereunder.

In the second action it is not immediately apparent whether a cause of action exists under Ohio law which will allow CEI to recover, as the record does not disclose that evidence was presented to the trial court on that issue. If a cause of action exists under the law of Ohio, CEI has a right to pursue it. Therefore, the trial court erred in dismissing the second action on the ground that it lacked jurisdiction. This case must be remanded to the trial court for a determination as to whether CEI has a remedy under Ohio law.

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25. All of the cases cited except for *Pan American* were removed to the federal courts by the defendants pursuant to Section 1441, Title 28, U. S. Code, and were on motion to remand to the state courts pursuant to Section 1447, Title 28, U. S. Code. In the instant case, although the City argued that the proper forum to decide the issues raised by CEI was in the federal courts, the record does not disclose an attempt by the City to remove the action to the Federal District Court.

II.

The court having jurisdiction, it must next decide whether to stay proceedings in the first action pending determination of matters before the Federal Power Commission[26] under the doctrine of primary administrative jurisdiction. The doctrine of primary administrative jurisdiction permits a court to avail itself of the expertise of an administrative agency having special competence in the matter at hand. As stated in *United States v. Western Pacific Railroad Co.* (1956), 352 U. S. 59, 63-64, 1 L. Ed. 2d 126, 132:

"Primary jurisdiction * * * applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, *have been placed within the special competence of an administrative body;* in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views. *General American Tank Car Corp. v. El Dorado Terminal Co.*, 308 US 422, 433, 84 L ed 361, 370, 60 S. Ct. 325." (Emphasis added.)

The doctrine of primary administrative jurisdiction does not apply, however, in relation to a question which, while properly determinable by an administrative agency *does not involve a matter within the special expertise of the agency* such as a matter of law. *Opdykev v. Security Savings and Loan* (1950), 59 Ohio Law Abs. 212, *aff'd*, 59 Ohio Law Abs. 257 (1951), *aff'd*, 157 Ohio St. 121 (1952); *Eastern Shore Natural Gas Co. v. Stauffer Chemical Co.* (Del. S. Ct. 1972), 298 A. 2d 322.

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26. As the United States Court of Appeals for the District of Columbia has affirmed FPC Order No. 644 in all matters except as to the rates to be charged prior to May 17, 1972, that issue is the only matter presently pending before the Commission, and it only affects the first action.

In the case at bar the defenses raised by the City in the first action are not only matters of law and not within the special competence of the FPC, they are matters of Ohio law,[27] an area where the FPC would be at a severe disadvantage in interpretation. The FPC should defer its resolution of the matters before it in this case concerning the interpretation of Ohio law until the courts of Ohio have decided the issue, as the FPC must abide by the Ohio courts' decisions on Ohio law.

If the defenses raised by the City had put into issue some matter which required the special expertise of the FPC, such as an allegation that the rates to be charged are arbitrary or unreasonable, this court would be compelled, pursuant to the doctrine of primary administrative jurisdiction, to defer to that expertise. However, the courts of Ohio are the ultimate arbiters of Ohio law and the duties and obligations thereunder, and we recognize this responsibility to adjudicate the issues herein as they are founded principally upon Ohio law.

III.

In its second assignment of error in Case No. 35002, the City of Cleveland contends that Cleveland Charter Sections 83, 106, 107 and 109 are applicable to a proper determination of the controversy in the first action.[28] The City never stated what it considers to be the effect of the applicability of these provisions. The City apparently

27. The City alleges in its assignments of error II and III in Case No. 35002 that the letter agreement violates both the Cleveland City Charter and City Ordinance No. 161-70, *see* Sections IV and V, *infra*.

28. The trial court had ruled that these City Charter provisions were inapplicable.

urges that if the letter agreement was made in violation of these provisions of the charter the agreement is void.[29]

This is not the first time the City of Cleveland has raised these sections of the City Charter to protect itself from a contract to which it had previously agreed, and which does not involve the expenditure of tax revenues.[30] In *Walsh Construction Co. v. Cleveland* (N. D. Ohio, 1920), 271 F. 701, *aff'd*, 279 F. 57 (6th Cir. 1922), the District Court for the Northern District of Ohio was presented with the same alleged defenses. The court reasoned that these charter provisions were the counterparts of sections of the General Code of Ohio.[31] These General Code sections, having been in effect for many years, had acquired a well-settled construction. They were only to apply to those cases in which a contract was to be paid out of revenues raised by taxes, *e. g. Frisbie Company v. The City of Cleveland* (1918), 98 Ohio St. 267; *Emmert v. Elyria* (1906), 74 Ohio St. 185,[32] and do not apply to funds from a public utility.

The court in *Walsh* reasoned that by incorporating these Code sections into the Cleveland City Charter, the City intended no change of law and therefore also incorporated the settled construction. The court concluded that the cited provisions of the Cleveland City Charter did not void a contract made contrary to them as long as the contract does not involve the expenditures of tax revenues.

29. These provisions of the Charter require a certificate of the Director of Finance specifying that sufficient funds are available before a contract on behalf of the City may be validly entered into.

30. Although it is not specifically stated in the letter agreement, it is apparent that the cost of the contract would come from the revenues of MELP and not the tax revenues of the City.

31. Former G. C. 5625-33 and 5625-34, now R. C. 5705.41(D).

32. This construction of the Code was incorporated into the Revised Code in 1953, R. C. 5705.44.

Walsh was followed by *Burt v. City of Cleveland* (1945), 76 Ohio App. 451. In *Burt* this court concluded that these provisions of the Cleveland Charter have no application where the contract involves the transit system and the funds to be expended were derived from the operating revenues of the system and not from taxation.

A similar result is dictated in the instant case. As the funds for the payment of the letter agreement were to be derived from the operating revenues of MELP and not from taxes, the City Charter provisions have no application. The City's assignment of error II in Case No. 35002 is overruled.[33]

IV.

The City, in its final assignment of error in Case No. 35002, states that City Ordinance No. 161-70 is a valid ordinance and applicable to this action. There is nothing in the journal entry or in the record of the Common Pleas Court that can be construed as holding that Ordinance 161-70 is either invalid or inapplicable. The actual basis for this assignment of error appears to be that the rates contained within the ordinance differ from the rates contained in the letter agreement; hence, the City contends that the letter agreement is not a valid contract.[34]

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33. The City also alleges that the City Charter, Section 108, requiring bidding on all contracts in excess of five hundred dollars, voids the contract. This allegation is similarly without merit. A general exception is recognized to this bidding requirement, if a real and present danger exists in connection with the operation of a municipal public utility, R. C. 735.051. In the instant case the power outage that occurred during Christmas, 1969, presented a real and present danger. This was recognized by the Cleveland City Council in unanimously enacting Ordinance 161-70, as it does not require competitive bidding, but authorizes the Director of Public Utilities to enter into a contract with CEI without bidding, *cf., Mutual Electric Co. v. Village of Pomeroy* (1918), 99 Ohio St. 75.

34. The City argues that the Director of Public Utilities is a mere agent of the City and cannot bind the City to a contract beyond his actual authority as given him by the City Council.

Ordinance 161-70 specifies that "* * * CEI shall sell said power to the City at a rate not to exceed 30c a month per KVA demand, $0.0085 per KWH for 10 million KWH and $0.005 per KWH above 10 million." The letter agreement uses a different expression to calculate the rates:

> "The rate for this service shall be as follows:
>
> "Contract Demand Charge—
>
> For each KVA of Contract Demand per month per KVA $0.30
>
> "Energy Charge—
>
> For the first 400 KWH per KVA of Contract Demand per KWH $0.0085
>
> "For all additional KWH $0.005
>
> "The City and the Company shall jointly determine the KVA capacity to be made available at each point of connection and the Contract Demand shall be the sum of such jointly determined loads to be supplied. The loads to be supplied initially at each of the locations shall be:
>
> "1. Collinwood—10,000 KVA;
>
> "2. Arctic—3,125 KVA;
>
> "3. Denison—3,125 KVA;
>
> "4. Clinton—3,125 KVA; and
>
> "5. Western—6,000 KVA.
>
> "The initial Contract Demand is 25,375 KVA."

As can be seen the rate to be charged the City in both the ordinance and the letter agreement is a two-tiered rate structure—the first component being a demand charge and the second, an energy charge. The demand charge is computed by determining the demand, measured

in KVA[35] and multiplying that amount by the rate per KVA.[36] The energy charge is determined by ascertaining the energy drawn over a billing period in KWH[37] and multiplying that by the appropriate rate per KWH.[38]

The City contends that the components of the rate contained in the letter agreement are different from the components of the rate in the Ordinance. In the demand charge portion of the rate the City states that the presence of a rachet clause[39] in the letter agreement not included in the City ordinance voids that term of the agreement.

The effect of the rachet was that each time the City consumed more energy than specified in the letter agreement[40] the contract demand[41] is increased to that amount and is never reduced, even if subsequent demand is reduced.

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35. A KVA or kilovolt ampere is equivalent to a kilowatt or one thousand watts.

36. Thirty cents in both the ordinance and the letter agreement.

37. A KWH or kilowatt hour is the equivalent of one KVA drawn for one hour.

38. In the ordinance, $0.0085 per KWH for the first 10 million KWH and $0.005 per KWH thereafter. In the letter agreement, $0.0085 per KWH for the first 400 KWH per contract demand, and $0.005 per KWH thereafter.

39. The rachet clause states:

"The Contract Demand shall be increased or decreased as appropriate when points of connection are added or removed. If the load supplied at any point of connection exceeds the amount specified and agreed upon, the Contract Demand shall be increased thereupon by the amount of such excess. The Contract Demand shall not be changed other than through the operation of the two preceding sentences."

40. The ordinance did not specify any demand load. It appears to leave the amount of load to be purchased to the discretion of the Director of Public Utilities.

41. The contract demand is the amount of power contracted for in the letter agreement. This amount is increased by the rachet.

The City urges this court to construe the term "demand" in the City ordinance not as the contract demand but as the actual demand, that is, the amount actually used by the City. The difficulty with the interpretation by the City of its ordinance is that CEI is not paid for energy which it must keep in reserve but which is not used by the City.

When a power company agrees to sell energy to a customer, it must be aware of the maximum load that the customer will put on its system, so that if the customer draws this maximum load the company will not experience a power outage. In other words, at any instant in time the company must keep in reserve an amount of power equal to the maximum load that may be drawn, less the actual load drawn at that instant.[42]

It is not rational to assume that the City Council would intend that CEI not be compensated for this power kept in reserve. Such interpretation encompasses the rachet, for as CEI was required to maintain greater amounts of power in reserve, the amount of its compensation for that reserve power would increase. The only reasonable interpretation of the term "demand," as used in the ordinance, is the amount called for or required by the contract—the contract demand.

That this interpretation was intended by City Council is further demonstrated by an understanding of the circumstances surrounding the enactment of the ordinance. An ordinance, such as this one, which is ambiguous, must be interpreted in light of the circumstances under which it was enacted, *Kitchen v. Duffield* (1947), 83 Ohio App. 41. *aff'd.* 149 Ohio St. 500, *cf.*, R. C. 1.49(B).

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42. Testimony of William N. Bingham, Principal Rate Engineer for CEI.

Lee C. Howley, vice-president and general counsel of CEI testified as to those circumstances: after the Christmas, 1969 outage officials from the City, including the Mayor, Director of Public Utilities and MELP engineers, met with representatives of CEI, including Mr. Howley. At this meeting the parties developed a basic understanding for the interconnection between the two systems. As a result of this arrangement, the City Council repealed Ordinance 115-70 by enacting Ordinance 161-70 which authorized the Director of Public Utilities to enter into this agreement. This action was taken by the City Council to legislatively effectuate the understanding reached by the parties on this matter.

The ordinance was a response to the agreement and a reasonable interpretation that the intent of City Council was to ratify the agreement between officials of CEI and MELP. As the City was attempting to ratify this understanding, the terms of the ordinance should be interpreted so as to effectuate that purpose, *State, ex rel. Grant v. Kiefaber* (1960), 114 Ohio App. 279, *aff'd*, 171 Ohio St. 326 (1960).

Under these circumstances, this can only lead to interpreting the term "demand" in the ordinance as the "contract demand" in the letter agreement.[43]

We find the third assignment of error by the City in Case No. 35002 without merit.

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43. The City's contention that the rate per KWH in the energy charge contained in the ordinance should be interpreted so as to void the term in the letter agreement, can be similarly disposed of. While it is readily apparent that the rate per KWH formulation in the letter agreement differs from that in the ordinance, it is not clear if the rate is less than that of the ordinance or greater than it. An examination of the testimony of William N. Bingham, Principal Rate Engineer for CEI, demonstrates that the rate in the letter agreement is less than the rate in the ordinance when the term "ten million KWH" in the ordinance is construed to refer to the amount used at each substation.

V.

In the first action we hold that the trial court correctly concluded that pursuant to Ohio law a cause of action exists against the City for its breach of the letter agreement, and that such cause of action is justiciable in Ohio courts. The court also was correct in holding that the letter agreement is not in conflict with either the specified sections of the Cleveland Charter or Ordinance 161-70.

In the second action we hold that the court had jurisdiction to adjudicate the rights of the parties under Ohio law. Consequently, the court below erred in dismissing the action without inquiring into whether the complaint of CEI set forth a cause of action under state law. We express no opinion as to whether such a cause of action exists, but CEI should be allowed the opportunity to demonstrate its contention.

Accordingly, the decision of the trial court in Case No. 35002 is affirmed, and the decision in Case No. 34959 is reversed and remanded for further proceeding according to law.

Judgment accordingly.

CORRIGAN, *J.*, concurs. PARRINO, *J.*, concurs in part and dissents in part.

PARRINO, *J.*, concurring in part and dissenting in part. I concur with the decision of this court in Case No. 35002 for the reasons stated in our opinion.

However, I dissent from the majority opinion in Case No. 34959 because the complaint clearly indicates that plaintiff-appellant's action in that case does not seek to enforce a contract which would be cognizable in a state

court,[44] but rather seeks to collect money owed appellant because of an order of the Federal Power Commission.[45] Such claim, in my opinion, may be brought only in federal district court. Section 825P, Title 16, U. S. Code.[46]

For these reasons, it is my opinion that the trial court was fully justified in granting defendant-appellee's motion to dismiss plaintiff-appellant's action in Case No. 34959 for lack of jurisdiction.

In Case No. 34959 I affirm.

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44. *Pan American Petroleum Corp. v. Superior Court of Delaware* (1961), 366 U. S. 656, 6 L. Ed. 2d 584.

45. Opinion No. 644 of the Federal Power Commission entered January 11, 1973 which established a rate for power supplied to the City of Cleveland after May 17, 1972 by the Cleveland Electric Illuminating Co.

46. The District Courts of the United States, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this chapter or the rules, regulations, and orders thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by, or to enjoin any violation of, this chapter or any rule, regulation, or order thereunder.

APPENDIX C

Order of the Supreme Court of Ohio Denying Motion for Leave to Appeal

(Filed April 8, 1977)

Nos. 77-100 and 77-101

THE SUPREME COURT OF OHIO

THE STATE OF OHIO, CITY OF COLUMBUS.

CLEVELAND ELECTRIC ILLUMINATING CO.,
Appellee,

vs.

CITY OF CLEVELAND,
Appellant.

APPEALS FROM THE COURT OF APPEALS
FOR CUYAHOGA COUNTY

These causes, here on appeals as of right from the Court of Appeals for Cuyahoga County, were heard in the manner prescribed by law, and, no motions to dismiss such appeals having been filed, the Court sua sponte dismisses the appeals for the reason that no substantial constitutional question exists herein.

APPENDIX D

Opinion of the United States Court of Appeals
District of Columbia Circuit

(Decided January 9, 1976)

No. 73-1282

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

CITY OF CLEVELAND, OHIO,
Petitioner,

vs.

FEDERAL POWER COMMISSION,
Respondent,

CLEVELAND ELECTRIC ILLUMINATING CO.,
Intervenor.

Before Fahy, *Senior Circuit Judge*, and Robinson and Wilkey, *Circuit Judges*.

Spottswood W. Robinson, III, *Circuit Judge*:

This petition for review poses centrally the question whether the Federal Power Commission erred in adopting a rate structure specified in a schedule filed by a public electric utility without resolving its municipal customer's contention that the schedule contravenes a preexisting agreement between the parties. We answer that question in the affirmative. Accordingly, while we affirm the Commission on all other issues presented, we remand the case for further proceedings.

I

The City of Cleveland, Ohio, operates an electric light plant from which a part of the electrical power it consumes is derived. Its remaining requirements are served by the Cleveland Electric Illuminating Company (CEI), a public utility as defined by the Federal Power Act.[1] During the 1969 Christmas season, the municipal plant suffered a forced outage of its largest generating unit, which rendered it unable to supply normal street lighting and customer service. The train of activity designed to meet this crisis led ultimately to the litigation now before us.

Negotiations between the City and CEI produced an early understanding on a temporary load transfer service[2] to alleviate the emergency.[3] To satisfy a requirement of the City's charter,[4] its City Council, on January 19, 1970,

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1. Act of June 10, 1920, ch. 285, 41 Stat. 1063, as added by Act of Aug. 26, 1935, ch. 687, pt. II, § 213(e), 49 Stat. 848. 16 U.S.C. § 824(e) (1970).

2. As explained by the City, this type of service "involves disconnecting a segment of [the municipal] distribution system and connecting it to the CEI system. This permits CEI to supply electricity for a portion of [the municipal plant's] load without requiring [the municipal system] and CEI to operate synchronously." Brief for Petitioner at 2 n. 2.

3. Prior proposals, extending back to 1942, for a permanent interconnection between the CEI and municipal systems had not materialized largely because the City wished to maintain a degree of self-sufficiency. It appears that about mid-1969, however, the City and CEI began consideration of a plan whereby CEI would take over a portion of the municipal plant's load, and that by the latter part of September engineering studies had progressed to the point that the amount and methodology of load transfer as well as approximate costs had been agreed upon, and a target date of March, 1970, had been set for completion. These arrangements were adaptable to the emergency which the City faced as 1969 drew to a close.

4. The City represents that "[a]s a political subdivision of the State of Ohio, Cleveland could enter into a contract for the service at the agreed-upon rates only by complying with the requirements of its City Charter, which requires that all contracts in-

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passed Ordinance No. 161-70[5] authorizing a contract with CEI for the service at rates previously worked out.[6] On the following day, representatives of the parties signed a letter agreement[7] calling for the service for a maximum

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Footnote Continued—

volving an expenditure in excess of $500 must first be authorized and directed by Ordinance of the City Council and which further provides that all contracts that do not comply with these requirements 'shall be void' "; and that "[s]ince the contract with CEI would involve an expenditure in excess of $500, an Ordinance was required to authorize the contract for load transfer service at the agreed-upon rates." Brief for Petitioner at 7-8. The record before us sets forth but two sections of the charter, and they do not themselves seem to attest the City's statement in all respects. They do, however, indicate that there are other sections which bear on the matter. Neither the Commission nor CEI disputes the City's representation, and like the parties we accept it for purposes of the present review.

5. Ordinance No. 161-70 repealed a substantially similar ordinance, No. 115-70, passed January 14, 1970. The principal purpose of Ordinance No. 161-70 was to provide for reimbursement to CEI for the cost of interconnection.

6. The ordinance specified that the contract "shall provide . . . that the CEI shall sell said power to the City at a rate not to exceed 30¢ a month per KVA demand, $0.0085 per KWH for 10 million KWH and $0.005 per KWH above 10 million." J.App. 65.

CEI's brief informs us that

> KVA (kilovolt amperes) is a measure of the total power supplied and indicates the minimum capacity of the equipment required to provide service. For the purpose of simplifying billing the monthly demand is determined in terms of kilowatt amperes, instead of kilowatts, thereby including both the physical demand on CEI and the power factor in one component of the rate. The maximum kilowatt (kw) demand and power factor (representing the average relationship between kw and kva) are determined monthly and converted to kva for use in billing, . . .

Brief for Intervenor at 5 n. 3.

7. As to rates, the agreement provided:

Contract Demand Charge—	
For each KVA of Contract Demand per month per KVA	$0.30
Energy Charge—	
For the first 400 KWH per KVA of Contract Demand per KWH	$0.0085
For all additional KWH	$0.005

J.App. 73.

term expiring on December 31, 1971.[8] The letter agreement and subsequent modifications[9] were later submitted to[10] and accepted by the Commission for filing as a rate schedule.[11]

CEI commenced service in February, 1970, and the City made payments therefor through March, 1971. At this point, the City challenged CEI's billings on the ground that the rates which it had filed with the Commission exceeded those which the parties had agreed to and which Ordinance No. 161-70 had authorized. This dispute, together with another over amounts allegedly owed by the City,[12] disrupted efforts to arrange a permanent interconnection, and precipitated a suit by CEI for arrearages,[13]

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8. The service was to terminate sooner if and when two gas turbines purchased by the City became operable to provide ready reserve and insure reliability of the system.

9. None of the modifications has any material bearing on this litigation.

10. CEI did not submit the authorizing ordinance as a part of its schedule-filing; instead, it listed the ordinance as one of the documents accompanying the filing.

11. The Commission's letter of July 17, 1970, accepting the letter agreement and the first modification, provided:

> This acceptance for filing does not constitute approval of any service, rate, charge, classification, or any rule, regulation, contract, or practice affecting such rate or service provided for in the above-designated rate schedule and rate schedule supplement; nor shall such acceptance be deemed as recognition of any claimed contractual right or obligation affecting or relating to such service or rate; and such acceptance is without prejudice to any findings or orders which have been or may hereafter be made by the Commission in any proceeding now pending or hereafter instituted by or against your company.

J.App. at 89-90. The Commission's letter of November 13, 1970, accepting two additional modifications, uses almost identical language, and the slight variation is unimportant to the issues presented on this review.

12. See note 13 *infra*.

13. The suit, filed in the Court of Common Pleas of Cuyahoga County, Ohio, claimed $1,352,286.60 in unpaid bills.

a complaint by the City launching the proceeding under review,[14] and a notice by CEI that it was cancelling the service.[15]

In its complaint to the Commission, filed May 13, 1971, the City sought a permanent interconnection with CEI,[16] a ruling on the rate and arrearages issues, and an order forbidding termination of the temporary service.[17] CEI extended its cancellation notice to December 16, 1971, at which time the Commission suspended the notice until May 17, 1972,[18] and on May 18 continued the service and the filed rates in effect pending further order.[19] On May 30, the Commission fixed interim rates for continuation of the service until entry of its final order in the proceedings.[20]

14. *City of Cleveland v. Cleveland Elec. Illuminating Co.*, Docket No. E-7631 (F.P.C.).

15. *Cleveland Elec. Illuminating Co.*, Docket No. E-7633 (F.P.C.).

16. See Federal Power Act § 202(b), 16 U.S.C. § 824a(b) (1970).

17. See Federal Power Act § 202(c), 16 U.S.C. § 824a(c) (1970).

18. *City of Cleveland v. Cleveland Elec. Illuminating Co.*, 46 F.P.C. 1326 (1971). In the same order, the Commission consolidated the City's complaint (Docket No. E-7631 and CEI's cancellation proceeding Docket No. E-7633), set both matters for hearing and denied the City's request for an immediate emergency interconnection. But see note 19 *infra*.

19. *City of Cleveland v. Cleveland Elec. Illuminating Co.*, 47 F.P.C. 1317 (1972). After rejecting the City's bid for an emergency interconnection, see note 18 *supra*, the Commission, on January 31, 1972, also turned down its request for a permanent interconnection. *City of Cleveland v. Cleveland Elec. Illuminating Co.*, 47 F.P.C. 198 (1972). On March 8, however, after the municipal plant experienced the latest of three outages over a five-month period, the Commission directed a temporary emergency interconnection. *City of Cleveland v. Cleveland Elec. Illuminating Co.*, 47 F.P.C. 747 (1972).

20. *City of Cleveland v. Cleveland Elec. Illuminating Co.*, 47 F.P.C. 1412 (1972).

During March and April, 1972, hearings were conducted by an examiner[21] who, on July 12, issued an initial decision[22] finding that a permanent synchronous interconnection would serve the public interest.[23] He directed the interconnection on specified terms and conditions, including authority to levy a charge for late payment of bills,[24] and proceeded to set rates for the permanent service[25] The examiner found wanting the City's argument that the rates filed by CEI, and exacted until the Commission-fixed rates went into operation,[26] did not abide the actual agreement of the parties.[27]

Both the City and CEI filed exceptions, upon consideration of which the Commission, in Opinion No. 644, adopted the examiner's decision in all but several relatively minor respects.[28] Adjustments were made in the rates,[29] which were to include the effects of an Ohio excise tax[30] an item which the examiner had excluded.[31] The Commission retained and refined the examiner's late-charge feature,[32] and left standing his rejection of the City's ob-

21. Now administrative law judge.

22. *City of Cleveland v. Cleveland Elec. Illuminating Co.*, 49 F.P.C. 126 (1972) (examiner's initial decision).

23. *Id.* at 128-129.

24. *Id.* at 129.

25. *Id.* at 128-129.

26. See text *supra* at notes 19-20.

27. *City of Cleveland v. Cleveland Elec. Illuminating Co.*, *supra* note 22, 49 F.P.C. at 131-132 (examiner's initial decision).

28. *City of Cleveland v. Cleveland Elec. Illuminating Co.* (Opinion No. 644), 49 F.P.C. 118 (1973).

29. *Id.* at 121-123.

30. *Id.* at 122-123.

31. *City of Cleveland v. Cleveland Elec. Illuminating Co.*, *supra* note 22, 49 F.P.C. at 133 (examiner's initial decision).

32. *City of Cleveland v. Cleveland Elec. Illuminating Co.* (Opinion No. 644), *supra* note 28, 49 F.P.C. at 123-124.

jection to the filed rates.[33] By Opinion No. 644-A, the City's application for rehearing was denied,[34] whereupon its petition for review by this court followed.

[1-6] The petition presents for our decision contentions that the Commission erred (a) in adhering to the rates filed by CEI despite the claims that they did not accurately reflect those previously agreed to;[35] (b) in prescribing permanent rates allegedly lacking substantial supporting evidence;[36] (c) in including the amount of the

33. *Id.* at 120.

34. *City of Cleveland v. Cleveland Elec. Illuminating Co.* (Opinion No. 644–A), 49 F.P.C. 631 (1973).

35. Discussed in Part II *infra.*

36. The rate set by the Commission for permanent load transfer service after May 17, 1972, see text *supra* at note 20, was 15.2 mills per KWH, which included 0.7 mills for the Ohio excise tax and another 1.2 mills for administrative and overhead costs. *City of Cleveland v. Cleveland Elec. Illuminating Co.* (Opinion No. 644), *supra* note 28, 49 F.P.C. at 123. Both of these items are contested by the City, and we discuss the tax factor in note 37 *infra.* The objection to the administrative-overhead factor is actually an attack on a cost-of-service presentation by CEI, from which that factor was derived; deeming the study discredited during the hearings, the City says that that factor lacks evidentiary support.

The 1.2-mill administrative-overhead cost component was 10% of CEI's energy-related expense of maintaining the permanent interconnection. In accepting the 1.2-mill figure, the Commission pointed out that "[t]he record demonstrates that this is the usual allowance in interconnection rates" and that "[t]he parties do not question that this is a commonly used rule-of-thumb estimate in the industry. . . ." *Id.* at 123.

The City argues, however, that CEI was entitled to recover only its own costs, and that it was error to use the industry rule-of-thumb estimate as a basis for projecting them. That position overlooks the propriety of considering an industry wide-average in the formulation of an opinion as to an item of the expense of furnishing a relatively new and untried service, and the desirability of doing so as a test of the reasonableness of the estimate. The cost data employed in the computation were CEI's own; only the percentage of those costs properly allocable to administration and overhead associated with the interconnection was affected by reference to industry-wide experience. The Commission was unable to "find any evidence that the industry

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Ohio excise tax in the makeup of the permanent rates,[37]

Footnote Continued—

figure of 10 percent chosen by CEI is unreasonable," *id.*, and that is also our view of the record before us. We have no cause to upset the Commission on this point.

Nor do we believe that we can override the Commission on other aspects of the sufficiency-of-the evidence argument tendered by the City. While there was some testimonial criticism of CEI's cost study, there was also support for the 1.2-mill result it reached, and no useful purpose could be served by detailing the opposing evidentiary presentations. For in the end it was for the Commission, not us, to evaluate the respective justifications put forth on the record, and to choose between two divergent theories in setting the amount of the challenged factor. A conclusion on "conflicting engineering and economic issues is precisely that which the Commission exists to determine, so long as it cannot be said . . . that the judgment which it exercised had no basis in evidence and so was devoid of reason." *United States ex rel. Chapman v. FPC,* 345 U.S. 153, 171, 73 S.Ct. 609, 619, 97 L.Ed. 918, 932-933 (1953). See also *Gainesville Utils. Dept. v. Florida Power Corp.*, 402 U.S. 515, 527-528, 91 S.Ct. 1592, 1599, 29 L.Ed.2d 74, 83-84 (1971); *Permian Basin Area Rate Cases (Continental Oil Co. v. FPC)*, 390 U.S. 747, 767, 88 S.Ct. 1344, 1360, 20 L.Ed.2d 312, 336 (1968). In this instance, we cannot say nearly so much.

37. In calculating the permanent rate, note 20 *supra*, the Commission made an allowance for Ohio taxes being levied against CEI's gross receipts from the load transfer service. The applicability of the tax to that operation was at the time the subject of litigation in state tribunals, and on that account the City insists that the tax was outlawed for ratemaking purposes. We do not agree. Taxes, like other necessary operating expenses, may properly be included as rate components, *e. g., Georgia Ry. & Power Co. v. Railroad Comm'n,* 262 U.S. 625, 633, 43 S.Ct. 680, 682, 67 L.Ed. 1144, 1148 (1923); *Galveston Elec. Co. v. City of Galveston,* 258 U.S. 388, 399, 42 S.Ct. 351, 356, 66 L.Ed. 678, 684-685 (1922); *City of Chicago v. FPC,* 147 U.S.App.D.C. 312, 336, 458 F.2d 731, 756 (1971), *cert. denied,* 405 U.S. 1074, 92 S.Ct. 1495, 31 L.Ed.2d 808 (1972); CEI was paying and had to continue payment of the tax until such time as the proper authorities in Ohio might rule to the contrary.

Moreover, the City is amply protected against the possibility that assessment of the tax in the situation at bar was legally mistaken. The Commission specified that in the event that the tax is held to be inapplicable, "CEI shall within 30 days from the date of such determination file rates to eliminate such tax and flow-through to City its proportionate share of any refunds, including interest thereon, received by CEI as a result of such determination." *City of Cleveland v. Cleveland Elec. Illuminating*

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and (d) in sanctioning the charge for late payment.[38] We

Footnote Continued—

Co. (Opinion No. 644), *supra* note 28, 49 F.P.C. at 125. And even if erroneously collected gross receipts taxes are nonrecoverable under Ohio law—a point on which the parties are in dispute—the City is sheltered from loss. While the Commission's order may be limited to refunds actually received by the taxpayer, CEI represents that it "has stated publicly before, and repeats herein, that it will refund any amounts attributable to the Ohio tax on bills rendered after May 17, 1972, if it is found that the Company is not legally required to pay this tax on these particular sales, regardless of *whether the Company receives a refund from the State for those amounts or not.*" Brief for Intervenor at 28 (emphasis in original). Thus the City has full recourse to CEI for reimbursement should the tax be declared inoperable.

38. The Commission directed a 5% increase in bills unpaid for 45 days, and an additional 1% after 60 days until paid. *City of Cleveland v. Cleveland Elec. Illuminating Co.* (Opinion No. 644), *supra* note 28, 49 F.P.C. at 123. Although the City had previously agreed to a late charge of 5% after 45 days and a flat 2½% after 60 days, *City of Cleveland v. Cleveland Elec. Illuminating Co., supra* note 22, 49 F.P.C. at 129 (examiner's initial decision), it now urges that the Commission's version of the charge lacks substantial supporting evidence.

The Commission noted that the "City has for some time refused to pay, or has been quite late in paying, certain bills rendered by CEI," and the Commission was sensitive to the consideration that in ordering interconnection it "may not, lawfully, impose an undue burden upon CEI." *City of Cleveland v. Cleveland Elec. Illuminating Co.* (Opinion No. 644), *supra* note 28, 49 F.P.C. at 123. The Commission explained that "[t]he imposition of an additional 5 per cent after 45 days should act as an inducement for prompt payment by City," a view in which the City concurred, *id.*, and the Commission also felt that

> [t]he imposition of an additional 1 percent per month appears for the following reason. An allowance for the cost of working capital as a part of rate base is properly included in a cost of service. The total impact of rate of return plus related state and Federal income taxes will average about 12 percent annually. The 1 percent per month addition to bills rendered by CEI to City but not paid within 60 days is not intended to be in the nature of a penalty, but rather, in effect, tracks the increased cost to CEI of providing additional working capital in recognition of the added time lag between the incurrence of costs by CEI and the receipt of revenues from City.

Id. at 124.

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agree with the City on the first point,[39] and with the Commission on the others.[40]

II

The City's primary argument is that CEI's filings with the Commission, which eventuated as the schedule governing the rates payable until the Commission fixed rates of its own,[41] departed from the preexisting agreement of the parties. As we approach our examination of that position we pause at the outset to more precisely define the problem. Save for different expressions of the formula for computation of CEI's charges for the load transfer service, the rates respectively specified in the parties' letter

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Footnote Continued—

We find no error in the Commission's prescription. In view of the City's history of delayed payment, the Commission was fully justified in requiring a late charge, and in relating the charge to the increased costs that late payment engenders the Commission stood on solid ground. "[T]he need for working capital arises largely from the time lag between payment by the Company of its expenses and receipt by the Company of payments for service in respect of which the expenses were incurred," *Alabama-Tennessee Natural Gas Co. v. FPC*, 203 F.2d 494, 498 (3d Cir. 1953), and we have no doubt whatever that the Commission may properly take that phenomenon into account. There is, too, ample support for the payment formula which the Commission prescribed notwithstanding the City's point that the record does not disclose CEI's cost of acquiring new capital. It is well settled that courts will take judicial notice of current rates of interest on normal borrowing, see *e. g., Simpson v. United States*, 252 U.S. 547, 550, 40 S.Ct. 367, 368, 64 L.Ed. 709, 712 (1920); *In re St. Louis-San Francisco Ry.*, 68 F.Supp. 921, 922 (E.D.Mo. 1946); *Olin J. Stephens, Inc. v. American Real Estate Co.*, 279 F. 435, 440 (S.D.N.Y.1921); *City of Danville v. Chesapeake & O. Ry.*, 34 F.Supp. 620, 638-639 (W.D.Va.1940), and we perceive no reason why an expert body like the Commission cannot do so for purposes of approximating the capital-acquisition costs of an industry it daily regulates.

39. See Part II, *infra*.

40. See notes 36-38 *supra*.

41. See notes 9-11 *supra* and accompanying text.

agreement,[42] in Ordinance No. 161-70[43] and in the filed schedule[44] are virtually the same.[45] The controversy arises from a variance, between the letter agreement and the rate schedule on the one hand and the ordinance and the antecedent agreement on the other, concerning an aspect of the City's liability beyond payment for the load transfer service at the stated rates. The letter agreement, and by virtue of its filing[46] the schedule in turn, contained what is known as a "rachet clause;" in stark contrast, no comparable element of the overall rate structure was mentioned in the ordinance or, at least from the City's viewpoint, during the prior negotiations between the parties. Consequently, the City contends that this feature was not a part of their bargain, and that its representative lacked authority to enter into an agreement containing such a provision.

The rachet clause provides in substance that when the amount of electrical energy actually supplied by CEI exceeds the amount called for by the letter agreement, the contract demand will thereupon increase by the amount of the excess.[47] The practical effect of this provision is that

42. See notes 7-8 *supra* and accompanying text.

43. See notes 5-6 *supra* and accompanying text.

44. The rates in the schedule were, of course, those in the letter agreement. See notes 9-11 *supra* and accompanying text.

45. All seem agreed that superficial language differences in this regard between the letter agreement and the ordinance are not genuine discrepancies, but only the products of different styles of authorship.

46. See notes 9-11 *supra* and accompanying text.

47. The rachet clause reads as follows:

> The Contract Demand shall be increased or decreased as appropriate when points of connection are added or removed. If the load supplied at any point of connection exceeds the amount specified and agreed upon, the Contract Demand shall be increased thereupon by the amount of such excess. The Contract Demand shall not be changed other than through the operation of the two preceding sentences.

J.App. 73.

each time consumption of energy above that specified in the agreement rises to a new level, the demand charge is elevated to that new level and is never reduced, even if actual demand thereafter declines substantially. The impact of the clause thus is upon the ultimate dollar amount owed by the City rather than upon the rate determining the charge for the energy used. Considering the potential of this clause for major automatic increases in the price of electricity to the City and its customers, the importance of the issue over it can hardly be downplayed.

The examiner upheld the applicability of the rachet clause in reliance on the so-called "filed rate doctrine"—the principle that a public utility may charge only the rate on file with the Commission unless changed in a manner sanctioned by the governing regulatory statute.[48] He said:

> City Ordinance 161-70, passed January 19, 1970, did not establish a contract between CEI and the City. It was a unilateral action by the City Council authorizing MELP [Municipal Electric Light Plant] to enter into an agreement with CEI for the load transfer service. The agreement of January 20, 1970, between CEI and MELP defines the contract between the parties and the terms of the load transfer service (Ex. 51-54). Rate Schedule No. 7, embodying that contract, was filed with the Commission by CEI, as Rate Schedule FPC No. 7. Under Section 205(c) and (d) of the Act, and the regulations issued pursuant thereto, the only legal rates are those rates which are on file with the Commission. The so-called Ordinance rate was never agreed to by the parties or filed with the Commission. The agreement of January 20, 1970, was

48. See notes 65-69 *infra* and accompanying text.

signed by the appropriate City officials, the Director of MELP and the Director of Law, and filed with the Commission. (Ex. 51-54) Any alleged violation of the Ordinance is a local matter between the City and its officials. The Ordinance cannot modify the provisions of the Federal Power Act or the regulations duly issued thereunder. As noted by the Court in *Northwestern Public Service Co. v. Montana-Dakota Utils. Co.*, . . .[49]

> "So long as the filed rate is not changed in the manner provided by the Act it is to be treated as though it were a statute, binding upon the seller and the purchaser alike."[50]

The Commission, following exceptions by the City to the examiner's decision,[51] disposed of the City's objection in an even more summary fashion:

> The so-called ordinance 161-70 rate, according to the Initial Decision, was never agreed to by the parties or filed with the Commission. Any alleged violation of the ordinance is a local matter between the City and its officials. The ordinance cannot modify the provisions of the Federal Power Act or the regulations duly issued thereunder.[52]

We cannot accept this disposition of the issue.

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49. 181 F.2d 19 (8th Cir. 1950), *aff'd*, 341 U.S. 246, 71 S.Ct 692, 95 L.Ed. 912 (1951).

50. *City of Cleveland v. Cleveland Elec. Illuminating Co.*, *supra* note 22, 49 F.P.C. at 131 (examiner's initial decision), quoting *Northwestern Pub. Serv. Co. v. Montana-North Dakota Utils. Co.*, *supra* note 49, 181 F.2d at 22.

51. See text *supra* at note 28.

52. *City of Cleveland v. Cleveland Elec. Illuminating Co.* (Opinion No. 644), *supra* note 28, 49 F.P.C. at 120.

By our analysis, the initial inquiry which the situation summoned was whether inclusion of the rachet clause in the letter agreement, and in turn in the filed rate schedule,[53] was in harmony with the terms of the ordinance and the understanding which the parties reached before the ordinance was enacted.[54] It cannot be gainsaid that the rachet clause exposed the City to substantially greater liability than a demand requirement without such a clause would have had, and the City has consistently maintained that racheting did not appear on the scene as a topic until the letter agreement was drafted. CEI contends that the racheting clause nevertheless did not outstep the authority conferred by the ordinance because the latter did not undertake to define how demand was to be determined. This argument leaves unanswered the question whether the parties' pre-ordinance agreement contemplated racheting, and the further question whether the City Council can give a city officer *carte blanche* to pass on a vital contractual specific upon which huge sums of public money may depend. In any event, CEI points to no evidence of industry custom or practice supporting the view that contract demand, standing alone, can mean anything other than actual calls for electrical power.

On the record as it now stands, there is undeniably a substantial but unresolved issue, in the first place, as to whether the letter agreement ever became binding on the City. More importantly, we are not free to " 'accept appellate counsel's *post hoc* rationalizations for agency action'; for an agency's order must be upheld, if at all 'on the same basis articulated in the order by the agency

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53. See note 10 *supra* and accompanying text.

54. See note 3 *supra* and accompanying text.

itself.' "[55] The truth of the matter is that neither the examiner nor the Commission addressed the possible inconsistency between the ordinance and the letter agreement occasioned by the presence of the rachet clause in the latter.[56] Both held merely that the letter agreement established the contract governing provision of the load transfer service, and that any impingement upon the Ordinance was an internal matter between the City and its officials.[57] The insuperable difficulty with this summary conclusion is that it overlooks the looming possibility that the City could enter into a contract for the load transfer service only by complying with its charter, which assertedly requires that all expenditures in excess of $500 have the authority of an ordinance, and provides that all noncomplying contracts shall be void.[58] It certainly does not automatically follow that the letter agreement, with the rachet clause, could rise to the dignity of a valid contract between the City and CEI without regard to the scope of authority conferred by the ordinance.

It seems, however, that at least the examiner's decision was not dependent on the conclusion that the letter agreement was valid irrespective of the constraints of the authorizing ordinance. He appears to have held that, under the "filed rate" doctrine, the rate on file with the Commission is the legal rate regardless of whether it is the rate agreed upon,[59] and surely that is the gloss put on his decision by counsel for the Commission. Counsel

55. *FPC v. Texaco, Inc.*, 417 U.S. 380, 397, 94 S.Ct. 2315, 2326, 41 L.Ed.2d 141, 156 (1974), quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168-169, 83 S.Ct. 239, 245-246, 9 L.E.2d 207, 215-216 (1962). See also *SEC v. Chenery Corp.*, 332 U.S. 194 196, 67 S.Ct. 1575, 1577, 91 L.Ed. 1995, 1999 (1947).

56. See text *supra* at notes 49-52.

57. See text *supra* at notes 49-50, 52.

58. See note 4 *supra*.

59. See text *supra* at notes 49-50.

suggest that there is no requirement that both parties to a rate consent to it as a condition precedent to its effectiveness;[60] "Congress intended that the filed rate should become binding unless and until the Commission should decide otherwise through its administrative processes,"[61] and

> [I]t seems quite illogical for Congress to provide for any kind of adjudicatory processes [for determining whether or not a rate is just and reasonable] if they envisioned the parties as being in agreement before a rate could take effect. In that event, the necessity for a hearing and regulation by the Commission would be obviated or, at least, reduced to whether the Commission agrees with the agreement of the parties. That the Commission's jurisdiction exceeds these bounds is so apparent as to not require citation of authority.[62]

We deem this position untenable. The City does not contend that the Commission is not free to determine whether rates required to be on file with it are just and reasonable, nor that only rates which have been agreed to by the parties can be filed.[63] The City does claim,

60. Brief for Respondent at 16-17.

61. *Id.* at 17.

62. *Id.* at 18.

63. Moreover, the City does not deny that the rachet clause appeared in the letter agreement nor that one of its principal officials signed that document. A curious and unelucidated aspect of this episode, however, is the indulgence by the City's representative of the rachet clause in the letter agreement in ostensible disregard of the ordinance. We are unable to ascertain whether that resulted from mere inadvertence, an understandable lack of appreciation of its legal significance, or otherwise, and we will indulge in no speculation on that score. The most that can be gleaned from the record is essentially negative: there is no evidence indicative of a prior dealing between the City and CEI utilizing a rachet clause or similar provision, with or without City Council approval; nor is there anything in the record to suggest that the clause had ever been considered by the City Council, even informally.

however, that where the parties have agreed to rates, only the rates agreed upon can be filed, and that in such instances it is error, which the Commission can later correct, to accept for filing a rate schedule which does not accurately reflect the parties' agreement.

We find the City's argument persuasive. The filed rate doctrine has been distilled from judicial embellishments of statutory provisions requiring submission of rates and charges to regulatory agencies.[64] Though not referring to the doctrine by its popular name, a leading Supreme Court decision applying the concept is *Pennsylvania Railroad Company v. International Coal Company*,[65] a case resolving charges of discrimination in tariff rates and rebates. Analyzing the legal effect of a tariff filed with the Interstate Commerce Commission, the Court observed that

> [t]he statute required the carrier to abide absolutely by the tariff . . . so long as it was of force, [it] was, in this respect to be treated as though it had been a statute, binding as such upon railroad and shipper alike.[66]

64. See cases cited *infra* notes 65-69. Read together, two sections of the Federal Power Act provide the statutory predicate for the doctrine in its application to public electric utilities. Section 205(c) provides in relevant part that "every public utility shall file with the Commission . . . schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to [them]." 16 U.S.C. § 824(c) (1970). Section 205(d) requires in part that "[u]nless the Commission otherwise orders, no charge shall be made by any public utility in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after 30 days' notice to the Commission and to the public." 16 U.S.C. § 824d(d) (1970).

65. 230 U.S. 184, 33 S.Ct. 893, 57 L.Ed. 1446 (1912).

66. *Id.* at 197, 33 S.Ct. at 896, 57 L.Ed. at 1451.

In later years, the filed rate doctrine, in this distinctly limited form, has been applied to sales of electrical power,[67] natural gas[68] and services of other industries under federal regulation,[69] and in this fashion it has served a very useful purpose. The considerations underlying the doctrine, however, are preservation of the agency's primary jurisdiction over reasonableness of rates and the need to insure that regulated companies charge only those rates of which the agency has been made cognizant.[70] We perceive no reason why the doctrine should be employed to render unmodifiable a rate which has been filed in breach either of authority or contract. Surely the agency loses no control over the rate-setting process by allowing a party to show that the rate on file is a mistake.

[7, 8] Even more fundamentally, the proposition that a filed rate variant from an agreed rate is nonetheless the legal rate wages war with basic premises of the Federal Power Act.[71] That legislation effectuates a congres-

67. See *e. g., Northwestern Pub. Serv. Co. v. Montana-Dakota Utils. Co., supra* note 49, 181 F.2d at 22-23: "the transmission of the electric energy being at wholesale and interstate, the seller must collect the charge named in the filed rate and the purchaser must pay that rate. So long as the filed rate is not changed in the manner provided by the Act, it is to be treated as though it were a statute, binding upon the seller and purchaser alike."

68. See *e. g., Hope Natural Gas Co. v. FPC*, 134 F.2d 287, 311 (4th Cir. 1943), *rev'd on other grounds*, 320 U.S. 591, 64 S.Ct. 281, 88 L.Ed. 333 (1944).

69. See, *e. g., Robinson v. Baltimore & O. R.R.*, 222 U.S. 506, 509-510, 32 S.Ct. 114, 115-116, 56 L.Ed. 288, 289-290 (1912) (railroad).

70. See cases cited *supra* notes 65-69.

71. See the elaborate discussion in *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332, 337-344, 76 S.Ct. 373, 377-381, 100 L.Ed. 373, 382-387 (1956), addressing the Natural Gas Act, Act of June 21, 1938, ch. 556, 52 Stat. 821, as amended, 15 U.S.C. §§ 717 *et seq.* (1970). The filing and rate-revision provisions of the Federal Power Act "are in all material

(Footnote continued on following page)

sional scheme under which electric utilities establish initially, by contract or otherwise, the rates they will charge, subject to revision by the Commission on a finding of unlawfulness.[72] To be sure, the utility may without negotiation or consultation with anyone, set the rates it will charge prospective customers, and change them at will, so long as they have not been set aside by the Commission on grounds of inconsistency with the Act.[73] Alternatively, since the Act by requiring rate contracts to be filed with the Commission[74] recognizes that rates can also be set by individual contracts with customers,[75] the utility may "fix by contract, and change only by mutual agreement, the rate agreed upon with a particular customer."[76] And it

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Footnote Continued—

respects substantially identical to the equivalent provisions of the Natural Gas Act." *FPC v. Sierra Pac. Power Co.*, 350 U.S. 348, 353, 76 S.Ct. 368, 371-372, 100 L.Ed. 388, 394 (1956); see also *Permian Basin Area Rate Cases (Continental Oil Co. v. FPC)*, *supra* note 36, 390 U.S. at 821, 88 S.Ct. at 1388, 20 L.Ed.2d at 366; *Richmond Power & Light v. FPC*, 156 U.S.App.D.C. 315, 317, 481 F.2d 490, 492, *cert. denied*, 414 U.S. 1068, 94 S.Ct. 578, 38 L.Ed.2d 473 (1973). Thus *Mobile* supplies excellent guidance in the case at bar.

72. *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, *supra* note 71, 350 U.S. at 338-344, 76 S.Ct. at 377-381, 100 L.Ed. at 383-386. See also *Permian Basin Area Rate Cases (Continental Oil Co. v. FPC)*, *supra* note 36, 390 U.S. at 822, 88 S.Ct. at 1388-1389, 20 L.Ed.2d at 367.

73. *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, *supra* note 71, 350 U.S. at 343, 76 S.Ct. at 380, 100 L.Ed. at 386.

74. Federal Power Act § 205(c), 16 U.S.C. § 824d(c) (1970). See note 64 *supra*.

75. *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, *supra* note 71, 350 U.S. at 338, 343, 76 S.Ct. at 377-378, 380, 100 L.Ed. at 383, 386.

76. *Id.* at 343, 76 S.Ct. at 380, 100 L.Ed. at 383.

is well settled that a contracted rate cannot be changed by the unilateral act of either party to the contract.[77]

It is essentially upon this branch of jurisprudence that the City's assault upon the rachet clause rests.[78] Its thesis is that, before action by its City Council or execution of the letter agreement, it had reached agreement with CEI as to the rates to be charged for the proposed load transfer service, and that a racheting of contract demand was not a part of the bargain. Later, the City states, when the transaction was reduced to writing, the rachet clause was incorporated into the finished product, and somehow escaped attention for months to come. So, the City says, CEI unilaterally changed the preexisting contract by filing the letter agreement embracing a purported contract term—the rachet clause—to which the City had not assented.

[9] We do not, of course, assess the merit of the City's position, nor do we intimate any view as to it.[79] We

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77. *Permian Basin Area Rate Cases (Continental Oil Co. v. FPC)*, *supra* note 36, 390 U.S. at 820-822, 88 S.Ct. at 1387-1389, 20 L.Ed.2d at 366-367; *FPC v. Sierra Pac. Power Co.*, *supra* note 71, 350 U.S. at 353, 76 S.Ct. at 371-372, 100 L.Ed. at 394; *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, *supra* note 71, 350 U.S. at 337-344, 76 S.Ct. at 377-381, 100 L.Ed. at 383-386; *Richmond Power & Light v. FPC*, *supra* note 71; *Portsmouth Gas Co. v. FPC*, 101 U.S.App.D.C. 99, 102-103, 247 F.2d 90, 93-94 (1957); *Cincinnati Gas & Elec. Co. v. FPC*, 101 U.S.App.D.C. 1, 6, 246 F.2d 688, 693 (1957). To be sharply distinguished is the Commission's authority to revise rate agreements "in circumstances of unequivocal public necessity." *Permian Basin Area Rate Cases (Continental Oil Co. v. FPC)*, *supra* note 36, 390 U.S. at 822, 88 S.Ct. at 1388-1389, 20 L.Ed.2d at 367. See also *FPC v. Sierra Pac. Power Co.*, *supra* note 71, 350 U.S. at 353-355, 76 S.Ct. at 371-373, 100 L.Ed. at 394-395; *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, *supra* note 71, 350 U.S. at 344-347, 76 S.Ct. at 381-382, 100 L.Ed. at 386-388.

78. The blind administrative application of the filed rate doctrine, without regard to the events forerunning the filing, misses the mark completely.

79. Similarly, we intend no intimation as to any justification which CEI may have.

think, however, that a utility is no more at liberty to alter an agreed rate as yet unfiled than it is to depart from one that has been filed.[80] And it goes without saying that the City is entitled to an adjudication of its claim of contract-change on a legally sound basis.

[10] It may be that the Commission could not readily have detected the problem as to the filed rate at the time CEI made its rate submissions.[81] But when, during the proceeding under review, the Commission was alerted to the possibility that the filed rate was infirm, it did not exert its authority to resolve the difficulty. The Commission is statutorily empowered to "issue . . . such orders . . . as it may find appropriate to carry out the provisions of" the Act,[82] a power undoubtedly extending to unauthorized rate filings.[83] We do not hesitate to characterize the City's claim that a component of the filed rate was inefficacious as a matter warranting investigation. Here the Commission was unmoved because it felt that the filed rate doctrine made any effort in that direction unnecessary or improper. We have now delineated our disagreement

80. *Sam Rayburn Dam Elec. Cooperative v. FPC*, 169 U.S. App.D.C. 281, 291, 515 F.2d 998, 1008 (1975); *Borough of Lansdale v. FPC*, 161 U.S.App.D.C. 185, 187, 188, 195, 494 F.2d 1104, 1106, 1107, 1114 (1974). "Rate filings consistent with contractual obligations are valid; rate filings inconsistent with contractual obligations are invalid." *Richmond Power & Light v. FPC, supra* note 71, 156 U.S.App.D.C. at 318, 481 F.2d at 493 (footnote omitted).

81. As we have mentioned, CEI did not submit the authorizing ordinance as a formal part of the letter agreement specifying the rates, but merely listed it as an accompanying document. See note 10 *supra*.

82. "The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this chapter. . . ." Federal Power Act § 309, 16 U.S.C. § 825h (1970).

83. *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp., supra* note 71, 350 U.S. at 347, 76 S.Ct. at 382, 100 L.Ed. at 388.

on that score, and it is clear enough that a rate schedule, though previously accepted by the Commission for filing, is not unalterable when corrections are clearly in order.[84]

[11, 12] The administrative approach taken in this case is puzzling, to say the least, for in accepting CEI's schedule submissions the Commission certainly did not view the rates specified therein as unchangeable. In each of its two letters accepting the schedule and the supplements thereto,[85] the Commission declared that "[t]his acceptance for filing does not constitute approval of any service, rate, [or] charge, . . . or any . . . contract or practice affecting such rate or service provided for in the . . . rate schedule. . . ."[86] "[N]or," said the Commission further, "shall such acceptance be deemed as recognition of any claimed contractual right or obligation affecting or relating to such service or rate. . . ."[87] Rather, the Commission emphasized that "such acceptance is without prejudice to any findings or orders which may have been or may hereafter be made by the Commission . . . hereafter instituted . . . against your company."[88] The qualifications upon the Commission's acceptance of CEI's schedule-filing which these explicit disclaimers imposed left the door wide open for such corrections and adjustments of the filed rate structure as subsequently disclosed information might warrant. When this litigation was before the Commission, it did not see fit to pass through that door. Our decision today makes plain the Commission's responsibility to do so now.[89]

84. *Id.*

85. See note 11 *supra*.

86. See note 11 *supra*.

87. See note 11 *supra*.

88. See note 11 *supra*.

89. "[W]here agency action must be set aside as invalid, but the agency is still legally free to pursue a valid course of action, a reviewing court will ordinarily remand to enable the agency to enter a new order after remedying the defects that vitiated the original action."

We reverse the Commission's disposition of the rachet-clause issue. We affirm the Commission in all other respects. We remand the case to the Commission for further proceedings consistent with this opinion.

So ordered.

Supreme Court, U. S.
FILED
AUG 17 1977
MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

October Term, 1977

No. 77-41

CITY OF CLEVELAND, OHIO,
Petitioner,

vs.

THE CLEVELAND ELECTRIC ILLUMINATING COMPANY,
Respondent.

SUPPLEMENTAL BRIEF

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Respondent.

SUPPLEMENTAL BRIEF

The purpose of this supplemental brief is to bring to this Court's attention the attached opinion by the United States Court of Appeals, District of Columbia, which appeal directly involves the subject matter of our Petition for Certiorari. Said opinion is subject to formal revision. It was filed after our Petition for Certiorari had gone to the printer.

The opinion further emphasizes the heavy involvement of the Federal adjudicatory system in the rate matters that were decided by the Ohio Courts. This opinion and

the Ohio State Court decisions further demonstrate the necessity for a determination by this Court of the jurisdictional limits of Federal and state authority to bring order out of chaos in this and other similar rate proceedings.

Respectfully submitted,

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APPENDIX

Opinion of United States Court of Appeals, District of Columbia in City of Cleveland v. Federal Power Commission, et al.

(Filed July 1, 1977)

No. 73-1282

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CITY OF CLEVELAND, OHIO,
Petitioner

v.

FEDERAL POWER COMMISSION,
Respondent

CLEVELAND ELECTRIC ILLUMINATING CO.,
Intervenor

Opinion On Motion For An Order Directing Compliance With Mandate

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Before FAHY, *Senior Circuit Judge*, and ROBINSON and WILKEY, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* ROBINSON.

ROBINSON, *Circuit Judge*: This litigation confronts us a second time. On its first appearance in this court, we held that the Federal Power Commission erred in adopting a schedule of rates filed by Cleveland Electric Illuminating Company (CEI), a public electric utility, without

resolving the persisting claim of its municipal customer, the City of Cleveland, Ohio, that the rates exceeded those to which the parties had previously agreed for service to be supplied to the City.[1] Our mandate directed further proceedings by the Commission,[2] and a controversy now rages over the scope of the investigation that the Commission is thus obliged to make. When we recall the pertinent events[3] and consult well settled legal principles,[4] we are led to another adjudication in favor of the City.

I

Over a period of time, representatives of the City and CEI worked out the details of a load transfer service, including rates therefor.[5] Responsively to the City's charter, its City Council enacted an ordinance authorizing execution of a contract with CEI at rates specified therein.[6] A letter agreement was signed, and with modifications was submitted to and accepted by the Commission for filing as a rate schedule.[7] A dispute subsequently arising, however, bared a "ratchet clause"[8] appearing in the letter agree-

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1. *City of Cleveland v. FPC*, 174 U.S.App.D.C. 1, 525 F.2d 845 (1976).

2. See *id.* at 13, 525 F.2d at 857.

3. Synopsized in Part I *infra*.

4. Discussed in Part II *infra*.

5. *City of Cleveland v. FPC*, *supra* note 1, 174 U.S.App.D.C. at 2-3, 525 F.2d at 846-847.

6. *Id.* at 3, 525 F.2d at 847.

7. *Id.* at 3 & n.11, 525 F.2d at 847 & n.11.

8. As explained in our prior opinion,

> [t]he ratchet clause provides in substance that when the amount of electrical energy actually supplied by CEI exceeds the amount called for by the letter agreement, the contract demand will thereupon increase by the amount of the excess. The practical effect of this provision is that each time con-

(Continued on following page)

ment—and by its filing eventuating into the rate schedule—which was not mentioned in the ordinance or, according to the City, discussed during the antecedent negotiations.[9]

In litigation before the Commission and later before this court, the City contended that the filed rates did not coincide with the rates contracted for, and thus that the rate schedule was subject to appropriate revision.[10] The Commission disagreed[11] but, for reasons articulated in our opinion, we found the City's argument persuasive enough to require investigation and adjudication of its claim.[12] We accordingly reversed the Commission on this score[13] and remanded the case for further proceedings consistent with the opinion.[14]

On remand, the parties deadlocked on the breadth of the inquiry which the Commission was summoned by our mandate to make. After a settlement conference failed to

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Footnote continued—

> sumption of energy above that specified in the agreement rises to a new level, the demand charge is elevated to that new level and is never reduced, even if actual demand thereafter declines substantially. The impact of the clause thus is upon the ultimate dollar amount owed by the City rather than upon the rate determining the charge for the energy used.

Id. at 7, 525 F.2d at 851 (footnote 47, setting forth the text of the ratchet clause, omitted).

9. *Id.*

10. *Id.*

11. *City of Cleveland v. Cleveland Elec. Illuminating Co.*, (Opinion No. 644) 49 F.P.C. 118, 120, *rehearing denied* (Opinion No. 644-A), 49 F.P.C. 631 (1973). See also *id.* at 126, 131 (examiner's initial decision) (1972).

12. *City of Cleveland v. FPC*, *supra* note 1, 174 U.S.App.D.C. at 9-13, 525 F.2d at 853-857.

13. We affirmed the Commission on all other points. *Id.* at 5-7 nn.36-38, 525 F.2d at 849-851 nn.36-38.

14. *Id.* at 13, 525 F.2d at 857.

achieve visible progress, the Commission's staff moved for an order establishing a schedule for briefs addressing the matters to be considered.[15] By CEI's interpretation of the mandate, the sole question was the role of the ratchet clause,[16] while the City insisted that the issue properly extended beyond to other energy charges for which it was billed, and which allegedly were also inconsistent with the parties pre-filing bargain.[17] The Commission concurred in the position advanced by CEI,[18] and we are asked to direct compliance with the mandate as the City reads it.

II

The decision of a federal appellate court establishes the law binding further action in the litigation by another body subject to its authority.[19] The latter "is without power to do anything which is contrary to either the letter or spirit of the mandate construed in the light of the opinion of [the] court deciding the case,"[20] and the higher tribunal is amply armed to rectify any deviation

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15. *City of Cleveland v. Cleveland Elec. Illuminating Co.*, Docket Nos. E-7631, E-7633, E-7713 (F.P.C. Nov. 5, 1976) (order establishing briefing schedule) (unreported).

16. *Id.* at 2.

17. *Id.* at 1-2.

18. *Id.* at 2. The Commission stated no ground for its action save the same construction given our mandate by CEI.

19. *Briggs v. Pennsylvania R.R.*, 334 U.S. 304, 306, 68 S.Ct. 1039, 1040, 92 L.Ed. 1403, 1405 (1948); *United States v. United States Dist. Court*, 334 U.S. 258, 263-264, 68 S.Ct. 1035, 1037-1033, 92 L.Ed. 1351, 1355-1356 (1948); *Baltimore & O. R.R. v. United States*, 279 U.S. 781, 785, 49 S.Ct. 492, 493, 73 L.Ed. 954, 956 (1929); *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255, 16 S.Ct. 291, 293, 40 L.Ed. 414, 416 (1895).

20. *Yablonski v. UMW*, 147 U.S.App.D.C. 193, 195, 454 F.2d 1036, 1038 (1971), *cert. denied*, 406 U.S. 906, 92 S.Ct. 1609, 31 L.Ed.2d 816 (1972), quoting *Thornton v. Carter*, 109 F.2d 316, 320 (8th Cir. 1940).

through the process of mandamus.[21] "That approach," we have said, "may appropriately be utilized to correct a misconception of the scope and effect of the appellate decision."[22] These principles, so familiar in operation within the hierarchy of judicial benches,[23] indulge no exception for reviews of administrative agencies.[24] Our mission thus becomes definition of the exploratory obligation which our mandate laid upon the Commission, and for guidance we refer to our previous opinion.[25]

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21. *Yablonski v. UMW*, *supra* note 20, 147 U.S.App.D.C. at 195-196, 454 F.2d at 1038-1039 and authorities collected in notes 13-19.

22. See *id.* at 195, 454 F.2d at 1038 and authorities collected in note 13.

23. See generally 1B J. Moore, Federal Practice ¶ 0.404[10] (2d ed. 1948).

24. See *United Gas Improvement Co. v. Continental Oil Co.*, 381 U.S. 392, 406, 85 S.Ct. 1517, 1525, 14 L.Ed.2d 466, 475 (1965); *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 140, 145, 60 S.Ct. 437, 440, 442-443, 84 L.Ed. 656, 660, 663 (1940); *Mefford v. Gardner*, 383 F.2d 748, 758 (6th Cir. 1967); *Morand Bros. Beverage Co. v. NLRB*, 204 F.2d 529, 532 (7th Cir.), *cert. denied*, 346 U.S. 909, 74 S.Ct. 241, 98 L.Ed. 407 (1953). *Cf. FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 379, 85 S.Ct. 1035, 1039-1040, 13 L.Ed.2d 904, 911 (1965). We are mindful that "an administrative determination in which is imbedded a legal question open to judicial review does not impliedly foreclose the administrative agency, after its error has been corrected, from enforcing the legislative policy committed to its charge." *FCC v. Pottsville Broadcasting Co.*, *supra*, 309 U.S. at 145, 60 S.Ct. at 442, 84 L.Ed. at 663. See also *NLRB v. Food Store Employees Union*, 417 U.S. 1, 9, 94 S.Ct. 2074, 2080, 40 L.Ed.2d 612, 618 (1974); *United Gas Improvement Co. v. Continental Oil Co.*, *supra*, 381 U.S. at 406, 85 S.Ct. at 1525, 14 L.Ed.2d at 475; *FTC v. Colgate-Palmolive Co.*, *supra*, 380 U.S. at 379, 85 S.Ct. at 1040, 13 L.Ed.2d at 911. To this stage of the litigation, however, only purely legal questions have emerged and no aspect of congressional policy is involved, certainly as yet. See notes 19-23 *supra* and accompanying text.

25. It has long been recognized that the court's opinion may be consulted to ascertain the intent of the mandate. *In re Sanford Fork & Tool Co.*, *supra* note 19, 160 U.S. at 256, 16 S.Ct. at 293, 40 L.Ed. at 417; *FTC v. Standard Educ. Soc'y*, 148 F.2d 931, 932 (2d Cir. 1945); *Independent Nail & Packing Co. v. Perry*, 214 F.2d 670, 672 (7th Cir. 1954); *Ohio Oil Co. v. Thompson*, 120 F.2d 831, 835-836 (8th Cir.), *cert. denied*, 314 U.S. 658, 62 S.Ct. 112,

(Continued on following page)

When this case was here before, we faced "centrally the question whether the Federal Power Commission erred in adopting a rate structure specified in a schedule filed by a public electric utility without resolving its municipal customer's contention that the schedule contravenes a pre-existing agreement between the parties."[26] The City's major "contention["] [was] that the Commission erred . . . in adhering to the rates filed by CEI despite the claim ["]that they did not accurately reflect those previously agreed to";[27] the City's "primary argument [was] that CEI filings with the Commission, which eventuated as the schedule governing the rates payable until the Commission fixed rates of its own, departed from the preexisting agreement of the parties."[28] To be sure, the only specific instance of inconsistency identified by the City's briefs was the ratchet clause,[29] which accounts for the emphasis that we gave it in our opinion,[30] but the basic issue presented and decided

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Footnote continued—

86 L.Ed. 528 (1941). That may now be all the more necessary since the mandate may—and at least in this circuit ordinarily does—consist of no more than the court's opinion and judgment. See Fed.R.App.P. 41(a).

26. *City of Cleveland v. FPC, supra* note 1, 174 U.S.App.D.C. at 2, 525 F.2d at 846.

27. *Id.* at 5, 525 F.2d at 849.

28. *Id.* at 7, 525 F.2d at 851.

29. A rereading of the City's briefs on its original appeal to this court confirms the impression with which we were then left—that the claim of incongruence was created solely by the ratchet clause, an understanding mirrored in our prior opinion. That focus on the ratchet clause is without real significance, however. The City's arguments throughout had been cast more broadly in terms of disharmony between the rate schedule and the antecedent agreement; and the pivotal question which all parties freely addressed, and which unmistakably we decided, was the need for reconciliation of the two before approval of the schedule. In this milieu, mention of the ratchet clause was simply shorthand for reference to the larger problem.

30. *City of Cleveland v. FPC, supra* note 1, 174 U.S.App.D.C. at 7-13, 525 F.2d at 851-857:

loomed much larger. At stake was the pervasive view, espoused by the City, "that where the parties have agreed to rates, only the rates agreed upon can be filed, and that in such instances it is error, which the Commission can later correct, to accept for filing a rate schedule which does not accurately reflect the parties' agreement."[31]

So, the ratchet clause becomes something of a focal point because assertedly it was a manifestation of divergence of the rates agreed to and the rates filed.[32] And indubitably, our decision encompassed, not the ratchet clause alone, but the vice of any such divergence.[33] The key elements of our holding were that "the proposition that a filed rate variant from an agreed rate is nonetheless the legal rate wages war with basic premises of the Federal Power Act":[34] "that a contracted rate cannot be changed by the unilateral act of either party to the contract";[35] and "that a utility is no more at liberty to alter an agreed rate as yet unfiled than it is to depart from one that has been filed."[36]

In sum, our decision would have been the same had incongruence of the pre-filing agreement and the filed schedule been suggested by some other identified discrepancy. Fairly read, our opinion maintained the thesis that any material variation between the two, however evidenced, would jeopardize the rates on file. It follows that other features of the energy charges of which the City complains, if not ingredients of the parties' pre-filing understanding, would equally have that effect.

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31. *Id.* at 10, 525 F.2d at 854.

32. See *id.* at 7, 525 F.2d at 851.

33. *Id.* at 7-12, 525 F.2d at 851-856.

34. *Id.* at 10-11, 525 F.2d at 854-855.

35. *Id.* at 11, 525 F.2d at 855.

36. *Id.* at 12, 525 F.2d at 856.

We thus reject the Commission's proposal to confine the inquiry on remand to the impact of the ratcheting clause. The mandate rule,[37] as is readily apparent, is a specific application of the doctrine commonly known as the law of the case.[38] We are advertent to the consideration that the doctrine, unlike res judicata,[39] does not apply to points not decided on a previous appeal, even though they then could have been.[40] But the " 'law of the case', . . . when used to express the duty of a lower court to follow what has been decided by a higher court at an earlier stage of the case, applies to everything decided, either expressly or by necessary implication,"[41] and so it does here.[42] Our prior decision inexorably outlaws all uni-

37. See text *supra* at notes 19-20.

38. See *In re Sanford Fork & Tool Co.*, *supra* note 19, 160 U.S. at 255, 16 S.Ct. at 293, 40 L.Ed. at 416; *Banco Nacional de Cuba v. Farr*, 383 F.2d 166, 178 (2d Cir. 1967), *cert. denied*, 390 U.S. 956, 88 S.Ct. 1038. 19 L.Ed.2d 1151 (1968); *In re United States Steel Corp.*, 479 F.2d 489, 493-494 (6th Cir.), *cert. denied*, 414 U.S. 859, 94 S.Ct. 71, 38 L.Ed.2d 110 (1973); *United States ex rel. Epton v. Nenna*, 318 F.Supp. 899, 906 (S.D. N.Y. 1970).

39. The rule of res judicata, applicable only to new litigation between the same parties or privies on the same cause of action, bars relitigation not only of issues adjudicated but also of those which could have been raised and decided in the earlier proceeding. See *National Savs. & Trust Co. v. Rosendorf*, No. 74-1400 (D.C. Cir. June 23, 1977), at 7 n.26.

40. *Hartford Life Ins. Co. v. Blincoe*, 255 U.S. 129, 136, 41 S.Ct. 276, 278, 65 L.Ed. 549, 552 (1921); *In re Sanford Fork & Tool Co.*, *supra* note 19, 160 U.S. at 257-259, 16 S.Ct. at 293-294, 40 L.Ed. at 417; *Salvoni v. Pilson*, 86 U.S.App.D.C. 227, 231, 181 F.2d 615, 619, *cert. denied*, 339 U.S. 981, 70 S.Ct. 1030, 94 L.Ed. 1385 (1950); *Cataphote Corp. v. Hudson*, 422 F.2d 1290, 1296 (5th Cir. 1970).

41. *Munro v. Post*, 102 F.2d 686, 688 (2d Cir. 1939). Accord, *Lehrman v. Gulf Oil Corp.*, 500 F.2d 659, 663 (5th Cir. 1974), *cert. denied*, 420 U.S. 929, 95 S.Ct. 1128, 43 L.Ed.2d 400 (1975); *Cherokee Nation v. Oklahoma*, 461 F.2d 674, 678 (10th Cir. 1972), *cert. denied*, 409 U.S. 1039, 93 S.Ct. 521, 34 L.Ed.2d 489 (1972); *United States ex rel. Epton v. Nenna*, *supra* note 38, 318 F.Supp. at 906. See also *Thornton v. Carter*, *supra* note 20, 109 F.2d at 836.

42. See text *supra* at note 24.

lateral alterations of agreed-upon rates, and our mandate requires the Commission to determine whether the energy charges, no less than the ratchet clause, are of that ilk. The City's motion for direction of compliance is accordingly granted,[43] and our order will so provide.

Motion granted.

43. The City obviously seeks relief in the nature of mandamus. See note 21 *supra* and accompanying text.

Supreme Court, U. S.
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Supreme Court of the United States

October Term, 1977

No. 77-41

CITY OF CLEVELAND, OHIO,
Petitioner,

vs.

THE CLEVELAND ELECTRIC ILLUMINATING COMPANY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS FOR THE
EIGHTH APPELLATE JUDICIAL DISTRICT OF OHIO

BRIEF FOR RESPONDENT IN OPPOSITION

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In accordance with Rule 40(3) of the United States Supreme Court Revised Rules, no repetition of the opinions below, jurisdictional basis, or statutes involved in the Petition is made in this Brief in Opposition. Respondent adopts Petitioner's statement of these items without approving the characterization made in Petitioner's listing.

QUESTION PRESENTED

Whether this Court will deprive the State Court of jurisdiction to resolve this utility contract dispute, involving determinations of state law, merely because the utility is also subject to federal regulation.

STATEMENT OF THE CASE

The Cleveland Electric Illuminating Company (hereinafter referred to as "CEI") is an investor-owned public utility serving the Greater Cleveland and Northeast Ohio Area. CEI's customers account for all but approximately 20 percent of the retail electric load in the City of Cleveland. To serve that remaining retail load, the City of Cleveland operates a municipal power utility. The Division of Light and Power of the City of Cleveland, Department of Public Utilities, is the operational manager of the utility, but all control of rates and expenditures is vested by charter in the Cleveland City Council. In the proceedings below, the City-owned utility is repeatedly identified by its major facility, the Municipal Electric Light Plant ("MELP").

This case involves the City's failure to maintain payments under a contract made with CEI to provide power to assist MELP with its retail load.

A severe power outage in the City's system during Christmas, 1969, caused the City to seek a tie-in to the CEI system. On January 19, 1970, the Cleveland City Council enacted an ordinance authorizing a contract with CEI for a tie-in. The City then entered into an agreement with CEI and that agreement was subsequently amended. Electrical service to the City was commenced in February, 1970, and has continued until now.

The agreement between the City and CEI, the rates set by agreement, and three subsequent amendments to the agreement were all filed with and approved by the Federal Power Commission (hereinafter designated "FPC"). No protest to the agreement or the rates charged thereunder were ever filed by the City with the FPC until after the City fell behind in its payments under the agreement and after CEI had filed suit to collect on the payments

past due in the Common Pleas Court of Cuyahoga County, Ohio.

The City's response to the CEI collection action in state court was to commence proceedings before the FPC. The FPC ordered CEI to maintain the interconnection permanently, confirmed the rates charged from February, 1970 to May, 1972, and established new rates commencing May 17, 1972. All other issues concerning the contract were also resolved against the City. The City appealed the FPC action to the United States Court of Appeals for the District of Columbia Circuit.

While the federal appeal was pending, CEI filed a second collection action in the same state court for monies due since May 17, 1972. The two collection actions were consolidated and submitted to the Common Pleas Court for trial without jury. The trial court on June 4, 1975, ruled in favor of CEI on the first collection action, and ordered judgment in the amount of $547,115.33 plus interest for the City's breach of the agreement. On the second action, the trial court dismissed the complaint for want of jurisdiction.

On December 2, 1976, the Court of Appeals of Ohio, Eighth Appellate District, affirmed the lower state court's judgment for CEI in the first action, reversed the lower court's determination that it lacked jurisdiction to hear the complaint for collection in the second action, and remanded the second action for trial in the lower court. The City appealed to the Supreme Court of Ohio, which refused to review the decision of the Court of Appeals of Ohio, Eighth Appellate District, on April 8, 1977. Thereupon the City filed its petition for writ of certiorari with this Court.

ARGUMENT

The issue raised in this petition is a narrow one that has already been clearly decided by this Court. No degree of protracted rationales can transform it into one requiring reexamination by this Court. The courts below correctly determined that there is jurisdiction of utilities regulated by federal law in state courts for state law remedies.

I. The Ohio Court of Appeals Correctly Determined That the Existence of Federal Regulatory Authority Over Public Utilities Does Not Bar a Plaintiff Utility From Pursuing At Its Option Remedies Based Solely on State Law In State Forums.

This case is a collection action, plain and simple. One of two parties to a contract fell behind on payments under the contract. The other party sued for relief in the state courts of the state in which both parties reside, the same state in which the contract was made. The issues in the state tribunal were whether or not the agreement conflicted with the terms of the authorizing ordinance and whether or not funds were due to CEI because of the electrical energy delivered to MELP by CEI. The state tribunals resolved all of the questions on the basis of state law.

The fact that the party that fell behind in payments under the contract was the City of Cleveland is no bar to state court jurisdiction. The issues of municipal contract law remain state law questions. The municipal law question of whether or not the ordinance established the terms of the contract is a question of state law. The fact that the plaintiff in suit is the Cleveland Electric Illuminating Company, a public utility subject to federal regulation, does not change the nature of the state law questions put in suit. CEI might also have pursued its remedies under federal law. CEI has the right to pursue remedies under

state law in a state tribunal. "[T]he party who brings a suit is master to decide what law he will rely upon." *The Fair v. Kohler Die & Specialty Co.*, 228 U.S. 25, 33 S. Ct. 410, 57 L. Ed. 717 (1913).

In *Cleveland Electric Illuminating Company v. Cleveland,* 50 Ohio App. 2d 275 (1976), the Court of Appeals of Ohio, Eighth Appellate District, correctly ruled:

> Under the Ohio Constitution, Section 4, Article VI, and R.C. 2505.01, the Common Pleas Court has jurisdiction to adjudicate the rights and obligations of the parties under Ohio law without resort to the Federal Power Act or the rules, regulations, or orders thereunder. (Respondent's appendix, A-18.)

The petition fails to recite any challenge to the correctness of that ruling.

II. The "Exclusive Jurisdiction" Granted the Federal Courts By Section 317 of the Federal Power Act (16 U.S.C. §825p) Does Not Deprive The State Courts of the Power to Determine Questions Involving Regulated Utilities.

When CEI elected to bring suit in the state courts of Ohio on a contract claim, it did not seek to avoid the regulations and rules of the Federal Power Commission. CEI filed its collection action in the same state court system where it files all its collection actions. Like any other customer, MELP failed to pay its bills and CEI sued to collect.

The City of Cleveland, acting like many delinquent customers do, sought to delay the suit. Because of the federal regulatory scheme, the City's first response to the suit was to file a complaint before the FPC. The FPC resolved the issue against the City and the City appealed the FPC action. The Court of Common Pleas of Cuyahoga County resolved the issue against the City, and the City

appealed that court's decision. It has been over six years now and the City still has not paid all of its bills to CEI.

In its petition for writ of certiorari, the City argues that the state court judgment cannot stand because the Federal Power Act "would appear to give the federal courts exclusive jurisdiction over all collection actions based on the tariffs set by the Federal Power Commission . . . ." (Petition at page 4). To make such an argument, the City must ask this Court to "define the limits" of its ruling in *Pan American Petroleum Corporation v. Superior Court of Delaware*, 366 U.S. 656, 81 S. Ct. 1303, 6 L. Ed. 2d 584 (1961). Actually, the City is asking this Court to overrule its decision in *Pan American*, because the pronouncement in that case is incapable of redefinition without overruling.

The *Pan American* case involved a provision of the Natural Gas Act identical to Section 317 of the Federal Power Act. A natural gas pipeline company sued in state court to recover overpayments according to the terms of its contract with two natural gas producers. Claiming the state tribunal lacked jurisdiction because "exclusive jurisdiction" was given under the Natural Gas Act to the federal courts, the producers sought a writ of prohibition in the state court. The state supreme court denied the writ and the producers obtained a writ of certiorari to this Court to review the issue. In an opinion for a unanimous Court, Justice Frankfurter wrote:

> "Exclusive jurisdiction" is given the federal courts but it is "exclusive" only for suits that may be brought in the federal courts. Exclusiveness is a consequence of jurisdiction, not a generator of jurisdiction because of which state courts are excluded. 366 U.S. at 664.

An examination of Section 22 of the Natural Gas Act (15 U.S.C. §717u) and Section 317 of the Federal Power Act (16 U.S.C. §825p) indicates that the grant of juris-

diction is identical in both acts. Only by directly overruling *Pan American* could this Court rule for the Petitioner. The City is really arguing that, because the FPC regulates CEI and the Federal Power Act gives "exclusive jurisdiction" to the federal courts of all suits in equity and in law under the Act, CEI must pursue its overdue bills from the City before the Federal Power Commission or in the federal courts. Such an argument would suggest that all collection actions by regulated utilities must be brought to the FPC and the federal courts. The Congress could not have intended such an outrageous grant of exclusive jurisdiction. The argument ignores the countless state law issues faced by a regulated utility, e.g. zoning, land appropriation, and negligence. Public policy could not be served by bringing all such actions before the federal court.

III. The Petition Raises No Substantial Question of Federal Law.

No amount of strained semantics can take this case outside the clear principle of federal law established in the *Pan American* case. The state courts have jurisdiction to hear causes of action based upon state law. The presence of a federal regulatory scheme for one or both parties in a state cause of action does not change the basic jurisdictional maxim enunciated by the Court in *Pan American*. Not only does the petitioner seek his writ of certiorari on an issue already clearly decided by the Court, but the issue the petition raises has been correctly decided by the state court. No substantial question of federal law is raised by the petition.

CONCLUSION

For all the aforementioned reasons, the respondent respectfully submits that this Petition for Writ of Certiorari to the Court of Appeals of Ohio, Eighth Appellate District, should be denied.

Respectfully submitted,

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